

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, as Amended

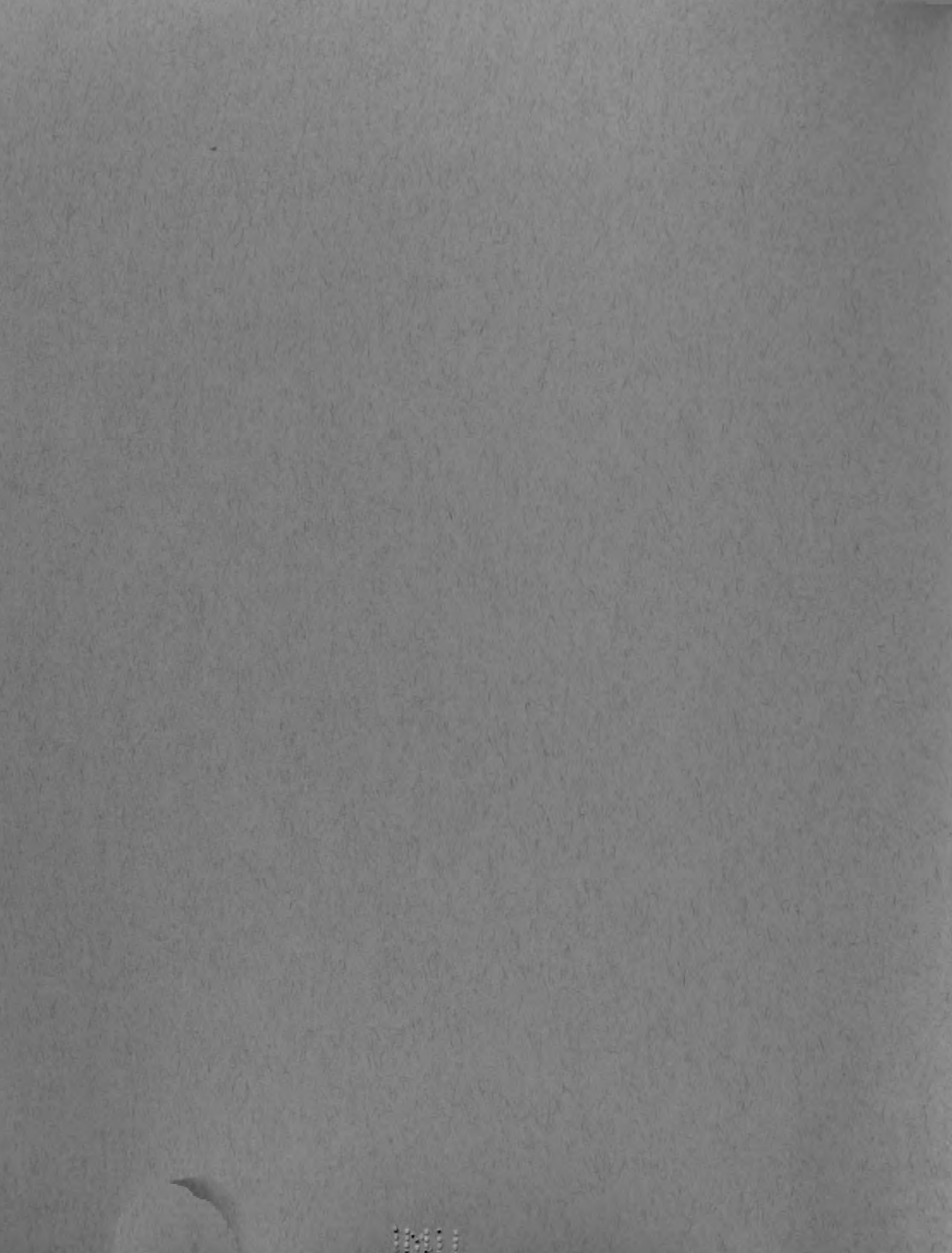
Division No. 87-1

Before: MacKinnon, Presiding,
Morgan and Pell, Senior Circuit Judges

Appendix to Report of Independent Counsel

In Re

Franklyn C. Nofziger, Edwin Meese III



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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FILED JUL 18 1988

**Division for the Purpose of
Appointing Independent Counsels**

**CONSTANCE L. DUPRÉ
CLERK**

Ethics in Government Act of 1978, as Amended

In re: Franklyn C. Nofziger, Edwin Meese III

Division No. 87-1

**Public Release of
Report of Independent
Counsel**

Before: MacKinnon, Presiding, Morgan and Pell, Senior Circuit Judges

ORDER

James C. McKay, Esquire, the Independent Counsel, having filed the redacted version of his Report pursuant to the Court's Order of July 6, 1988, and each individual named in the Report having submitted or been afforded an opportunity to submit to the Division of the Court comments and factual information for inclusion as an appendix to the Report, and the Court, in accordance with 28 U.S.C. § 594(h)(2) having determined that certain comments and factual information are appropriate for inclusion as an appendix to the Report; it is

ORDERED, that the redacted Report be accepted, and it is further

ORDERED, that the annexed comments and factual information submitted by the following individuals named in the Report be included as an appendix to such Report, namely: (1) Office of Government Ethics, Frank Q. Nebeker, (2) John R. McKean and Douglas Schultz, (3) Edwin Meese III, (4) Bruce Rappaport, (5) Dickstein, Shapiro and Morin, (6) Blake Construction Co., Inc., The Bender Foundation, Howard and Sondra Bender, (7) Franklyn C. Nofziger, (8) Wedtech Corporation, (9) E. Robert Wallach, and (10) Dr. R. Kent London; and it is further

ORDERED, that the Independent Counsel is authorized to retain in his possession one copy of the redacted Report and Appendix, and in the best interests of justice, that the redacted version of the Report, with the comments and factual information included

by this Order as an appendix to such Report, all as annexed hereto, shall be released by the Clerk to the Vice President, President Pro Tempore of the Senate, Speaker of the House, Majority Leaders of House and Senate, Minority Leaders of House and Senate, Chairmen and Ranking Minority Members of Senate and House Judiciary Committees, Chairmen and Ranking Minority Members of Senate Governmental Affairs Subcommittee on Oversight of Government Management and the House Judiciary Subcommittee on Administrative Law and Governmental Relations, the Acting Attorney General and the public; and it is further

ORDERED, that the Order of the Court of July 6, 1988, as amended, and this Order be released to the public.

Per Curiam
For the Court;


Constance L. Dupre
Clerk

CONFIDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Division for the Purpose of
Appointing Independent Counsels**

Ethics in Government Act of 1978, as Amended

In re: Franklyn C. Nofziger, Edwin Meese III

Div. No. 87-1

**Amendment of July 6,
1988 Order**

Before: MacKinnon, Presiding, Morgan and Pell, Senior Circuit Judges

ORDER

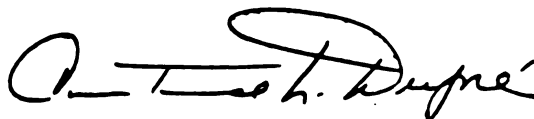
Upon further consideration of the Order of July 6, 1988, it is hereby

ORDERED, that the second paragraph entitled "ORDERED" be stricken and the following substituted in lieu thereof.

"ORDERED, that the Independent Counsel is authorized to retain one copy in his possession, and deliver one copy of the Report as filed with this Court to the Acting Attorney General of the United States (or his delegee) for use in the performance of his official duties, including any disclosure of the Report within the Department of Justice as the Acting Attorney General deems necessary in the performance of those duties; and it is further".

Per Curiam

For the Court:



Constance L. Dupre

Clerk

**United States Court of Appeals
For the District of Columbia Circuit**

FILED JUL - 7 1988

**CONSTANCE L. DUPRE
CLERK**

United States Court of Appeals
For the District of Columbia Circuit

CONFIDENTIAL

FILED JUL - 7 1988

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CONSTANCE L. DUPRE
CLERK

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, as Amended

In re: Franklyn C. Nofziger, Edwin Meese III

Div. No. 87-1

Amendment to July 6,
1988 Order

Before: MacKinnon, Presiding, Morgan and Pell, Senior Circuit Judges

ORDER

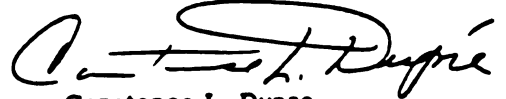
Upon consideration of the motion by Independent Counsel of July 6, 1988, the court having filed its procedural Order of July 6, 1988 before Independent Counsel filed his motion, it is hereby

ORDERED, that the court's Order of July 6, 1988, is hereby amended as follows:

In the fourth paragraph headed "ORDERED," in the second line thereof, after the comma following the word "material" and before the word "and", insert the following:

"except such material as may relate to Mr. or Mrs. Meese,"

Per Curiam
For the Court:



Constance L. Dupre
Clerk

ConfidentialUnited States Court of Appeals
For the District of Columbia Circuit**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT** **FILED JUL 6 1988**---- Division for the Purpose of
Appointing Independent Counsels**CONSTANCE L. DUPRÉ**
CLERK

Ethics in Government Act of 1978, as Amended

In re: Franklyn C. Nofziger, Edwin Meese III

Division No. 87-1

Re: Report of
Independent CounselBefore: MacKinnon, Presiding, Morgan and Pell, Senior Circuit JudgesORDER

James C. McKay, Esquire, the Independent Counsel appointed February 2, 1987, pursuant to 28 U.S.C. § 593, having on July 5, 1988 submitted his report to the division of the court pursuant to 28 U.S.C. § 595(b)(1), 97 Stat. 2039* (the "Report"), and upon further consideration of the requests made in pending motions, it is hereby

ORDERED, by the court, that the Report be accepted; and it is further

ORDERED, that the Independent Counsel is authorized to retain one copy in his possession, and to deliver to the Acting Attorney General of the United States (or his delegate) for use in the performance of his official duties one copy of the Report as filed with this court; and it is further

ORDERED, that, except as may be authorized by further order of this court, all copies of the Report, and such portions thereof as may be authorized to be made available to individuals, foundations, corporations named therein, and government officials, shall be kept confidential, that no person, corporation or official receiving a Report or any portion thereof, shall make any disclosure of the contents of the Report, or any portion thereof, or the names of parties receiving such matter, and that the

*The prior Act under which Independent Counsel was appointed, 96 Stat. 2039, 2041, continues to apply to subject cause in accordance with the savings clause set forth in § 6(b)(1) of the "Independent Counsel Reauthorization Act of 1987," P.L. 100-191, Dec. 15, 1987, 101 Stat. 1307, 28 U.S.C. § 591, et seq.

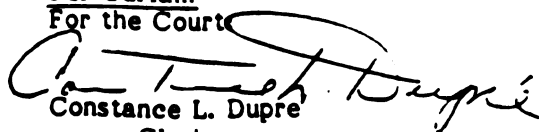
Independent Counsel shall not release or make available any confidential or classified matter, and it is further

ORDERED, that the Independent Counsel shall prepare a redacted version of the Report deleting all references to grand jury material, and shall, for the purposes set forth in 28 U.S.C. § 595(b)(3), make available the redacted version of the Report (and a copy of this order) at the offices of the Independent Counsel, 1111 18th Street, N.W., Suite 500, Washington, D.C. to Edwin Meese III and, for the purposes hereinabove set forth, shall also make available to E. Robert Wallach, W. Franklyn Chinn, Rusty Kent London, Welbilt Electronic Die Corporation/Wedtech Corporation, Financial Management International, Inc., Franklyn C. Nofziger, and each individual, foundation and corporation named in such redacted Report a copy of this order and such portions of the Report as may be relevant to any comment or factual information that such party may desire to submit to the court for possible inclusion as an appendix to such Report (with any dispute to be referred to the court); and it is further

ORDERED, that on or before July 14, 1988 each named individual, foundation and corporation shall submit to the court (with a copy to the Independent Counsel at his address set forth above) any comments or factual information they request be considered for inclusion as an appendix to such Report; and it is further

ORDERED, that, the pending motions by Mr. Meese and Mr. Wallach requesting "access to the grand jury testimony and exhibits of individuals who testified before the grand jury during the investigation of Mr. Meese and Mr. Wallach, . . . for the purpose of preparation of a response" to the Report as contemplated by 28 U.S.C. § 595(b)(3), are, for reasons set forth in the attached Memorandum, hereby denied for lack of jurisdiction; and it is further

ORDERED, that all the foregoing Orders are subject to the further order of the court.

Per Curiam
For the Court

Constance L. Dupre
Clerk

MEMORANDUM

28 U.S.C. § 48 provides that the Chief Justice of the United States shall designate and assign three circuit court judges to a division of the United States Court of Appeals for the District of Columbia Circuit "for the purpose of appointing independent counsels." Further authority and duties of such division of the court are set forth in title 28, United States Code, Chapter 40, § 591 et seq., Pub. L. 100-191, Dec. 15, 1987, 101 Stat. 1293.

Subject motion requests this division of the court to order the disclosure of all grand jury testimony to assist movants in preparing a response to the Report of Independent Counsel. The statute does provide:

The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report

28 U.S.C. § 594(h)(2).

This provision has been interpreted to authorize the court to issue "protective orders." Morrison v. Olson, ___ U.S. ___ (June 29, 1988), No. 87-1279, p. 21. Such orders are defined by Federal Rules of Civil Procedure as

any order . . . [relating to discovery or depositions designed] to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense

F. R. Civ. P., Rule 26(c). Authorizing the disclosure of grand jury testimony does not come within the contemplation of an order restricting discovery, etc.

Additional authority and duties are assigned to the division of the court, but while the Act authorizes the court to release such portions of the Report as it considers appropriate no provision of the Act refers to grand jury testimony, or specifically authorizes the special division to exercise any original jurisdiction with respect to motions that are traditionally confined to the original jurisdiction of district courts. We thus conclude that the motion to this court for the disclosure of grand jury testimony must be denied as beyond the court's jurisdiction. Id., 24, 25.



**United States
Office of Government Ethics**

P.O. Box 14108
Washington, D.C. 20044

United States District Court
For the District of Columbia

FILED JUL 14 1988

**CONSTANCE L. DUPRÉ
CLERK**

JUL 13 1988

In re: Meese, Edwin Meese III
Div No. 92-1
Appendix

**The Honorable George E. MacKinnon
5329 United States Courthouse
Washington, D.C. 20001**

Dear Judge MacKinnon:

Pursuant to the Court's Orders of July 6, 1988 and July 7, 1988, the Independent Counsel has disclosed to this Office certain portions of his July 5, 1988 Report in re: Edwin Meese III in which this Office is mentioned. With respect thereto, we wish to make a technical clarification relating to footnote 196 on page 513. The reference in the footnote to "designated agency ethics officer" is incorrect. Referenced subsection (f)(3) specifically requires that a "proposed trust instrument and proposed trustee" be approved by the Office of Government Ethics. Subdivision (D) of the subsection uses the term "supervising ethics office", which is defined within the subsection to mean the Office of Government Ethics.

Sincerely

Frank Q. Nebeker
Frank Q. Nebeker *FQ*
Director

cc: James C. McKay, Independent Counsel

In re Hofziger, Edwin Meese III
Div No. 97-1
Appointed

United States Court of Appeals
For the District of Columbia Circuit

Comments of John R. McKean and Douglas Schultz
Regarding the Meeses' 1985 Income Tax Return FILED JUL 14 1988

CONSTANCE L. DUPRÉ
CLERK

1. We have read the portions of the July 5, 1988 report of the Independent Counsel in re: Edwin Meese III which have been provided to us under the Court's orders of July 6, 1988 and July 7, 1988. We wish to provide the following comments.
2. On June 27, 1988, Mr. McKean submitted a signed declaration to the Independent Counsel relating the facts pertaining to the filing of the Meeses' 1985 income tax return. We believe the facts included in the report of the Independent Counsel taken in conjunction with the facts reported in the declaration by Mr. McKean show that there is no indication of any improper conduct by Mr. Meese.
3. In his declaration, Mr. McKean indicated that Mr. Meese understood the procedures to be followed in filing the amended return and that Mr. Meese fully acknowledged his responsibility to provide further information so that the amended return could be filed, as it subsequently was.
4. Subsequent to the filing of the original 1985 income tax return, both Mr. Meese and our office took actions which resulted in the filing of an amended return to reflect the securities transactions in question. We are convinced that these subsequent actions were a clear manifestation of the parties' intent to do so. This intention was concurred in by our client, and such concurrence was expressed to Mr. McKean from the outset by Mr. Meese.

**Comments of John R. McKean and Douglas Schultz
Regarding the Meeses' 1985 Income Tax Return**

5. The Independent Counsel's report correctly indicates that the amended 1985 return was completed in December, 1987; we were not notified of any inquiries of the Independent Counsel until mid January, 1988. With respect to suggestions in the report that the timing of the filing of the amended return was related to inquiries initiated by the Independent Counsel, the actions we took during the process of preparing and filing the amended 1985 income tax return were taken on merits and in furtherance of the reporting obligations.

6. We further submit that if we at any time believed there was any intent on the part of Mr. Meese to violate any of the federal income tax laws, we would have promptly discontinued our engagement to prepare the returns in question.

★ ★ ★ ★ ★ ★

In re Hofzinger, Edwin Meese III
Div No. 87-1
Appendix

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1

**DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS
ETHICS IN GOVERNMENT ACT OF 1978, AS AMENDED**

**Before: MacKinnon, Senior Circuit Judge, Presiding,
Morgan, Senior Circuit Judge and
Pell, Senior Circuit Judge**

**RESPONSE OF EDWIN MEESE III
TO THE
REPORT OF INDEPENDENT COUNSEL**

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(202) 293-6400
*Counsel for Attorney General
Edwin Meese III***

**Washington, D.C.
July 14, 1988**

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INTRODUCTION

After a 14-month investigation into many aspects of the Attorney General's public and private life, Mr. McKay has concluded that no indictment of Edwin Meese III should be sought. This was the only possible resolution of his investigation because no crime was ever committed, encouraged, aided or abetted by Mr. Meese.

Mr. McKay's Task

Mr. McKay's statutory mandate -- to "set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted" -- could have been accomplished in a space of 100 pages or less. It did not require the filing of an 829-page report. Mr. McKay's ponderous document is, first and foremost, an exercise in self-justification -- an attempt to rationalize to the American people the enormous expenditure of taxpayer funds and the extended duration of his investigation.

Exoneration on Initial Charges

Any sturdy soul who undertakes the arduous task of reading the entire report will see that it expressly vindicates Mr. Meese on the allegations that initially produced the

reference to Mr. McKay -- i.e., charges relating to the Wedtech Corporation. The report similarly exonerates Mr. Meese on all the publicized allegations concerning the investment of his family funds with W. Franklyn Chinn, on all questions relating to whether E. Robert Wallach ever provided unlawful benefits or gratuities to Mr. Meese, on all questions relating to Mr. Meese's financial disclosure reports, and on the matter of Mrs. Meese's employment with the Multiple Sclerosis Society. */

Mr. McKay's investigation of Wedtech, Meese Partners, Mr. Meese's financial disclosures, and the Wallach-Meese relationship could easily have been concluded within six months. Indeed, Mr. McKay now acknowledges that his Wedtech investigation ended as early as November 1987. At that point, his basic mandate was exhausted. He had finished his investigation of the subjects that had been referred to him, and he had concluded that there was no wrongdoing by Mr. Meese.

Request for Prompt Conclusion

In a letter of December 1, 1987, we requested that Mr. McKay announce the conclusion of his investigation of the Attorney General because it was "in the national interest that

*/ While the report contains innuendoes that evidence of wrongdoing by Mr. Meese might be derived from individuals who now invoke their constitutional privileges because they are under indictment, these suggestions are spurious. Mr. McKay knows that there is no substance to his implication that Messrs. Wallach, Chinn or London would, if their testimony were not privileged, incriminate Mr. Meese. Statements by their counsel that are appended to this Response refute Mr. McKay's suggestion and disclose that he has been told by their attorneys long ago that the testimony of these people would exonerate Mr. Meese.

public speculation over the prospects of the person occupying this office be laid to rest promptly." We urged him to consider that "the Attorney Generalship and the Department of Justice would be improvidently harmed if public speculation is permitted to endure any longer than is absolutely necessary."

Fishing in Foreign-Policy Waters

Mr. McKay chose not to end his investigation. Instead, he embarked on a new investigative foray -- "an all-out investigation of the Aqaba pipeline matter" (Report, p. 7). More than one-third of the body of his report is a microscopic examination of this foreign-policy initiative that was a proper and appropriate effort to assist the search for peaceful economic cooperation among adversaries in the Middle East. Spurred by a distorted reading of ten words buried in a memorandum written by Mr. Wallach, Mr. McKay undertook a laborious dissection of all phases of the Aqaba pipeline project, from its birth in March 1983 (more than two years before Mr. Wallach became involved) to its burial in February 1986. This is probably the most poorly conceived, ill-founded, and wasteful use of investigative resources in the history of American law enforcement.

The Empty Net

The full harvest of this mammothly expensive feckless venture is a finding that there is absolutely no evidence whatever -- neither direct nor circumstantial, neither legally admissible nor inadmissible -- of the slightest illegality or

impropriety in the entire Aqaba pipeline project beyond Mr. McKay's attenuated reading of ten ambiguous words in Mr. Wallach's memorandum. See Report, p. 577. But because Mr. McKay's staff launched this ill-conceived expedition into foreign-policy waters, the independent counsel investigation continued for at least half a year beyond its anticipated termination. This resulted in enormous injustice to Attorney General Meese, particularly when a distorted version of the focus of the Aqaba pipeline investigation was "leaked." Most of the information concerning the pipeline was classified data, and the Attorney General was handicapped in responding to public criticism and to a crescendo of calls for his resignation. In fact, the Aqaba pipeline investigation was a colossal failure, and Mr. McKay's summary of the evidence only proves the folly of his decision to undertake it.

A Massive Effort

There is, to be sure, great frustration in conducting a 14-month investigation, at enormous public expense, and producing no tangible result. Mr. McKay's "Foreword" thanks 7 full-time attorneys who worked on the investigation of Mr. Meese, in addition to 5 consulting attorneys who are identified with Mr. Meese's investigation, 8 Special Agents of the FBI, 3 Special Agents and 2 Revenue Agents of the IRS, 16 clerical employees and 2 managerial and technical assistants. It specifies unnamed and unnumbered "career lawyers at the Department of Justice" and names eight federal agencies whose "officials and other staff

members" assisted his investigation. Publicly available figures show that Mr. McKay's office has spent in excess of \$1.4 million on the Meese and Nofziger investigations through April 30, 1988.

Justifying the Cost

In an effort to justify the cost of such Herculean labors, Mr. McKay's staff ultimately seized on two matters that are said to have been discovered in the course of the investigation, and has, with regard to both, issued grossly unjust pronouncements. Mr. McKay asserts that there were "probably" violations of a conflict-of-interest law in the Attorney General's conduct with respect to certain telecommunications matters in 1985-1986 and "probably" violations of criminal tax laws in the October 1986 filing of his personal tax return for 1985. As to each of these matters, for a host of reasons, Mr. McKay concludes that "prosecution is not warranted." See Report, pp. 73-76, 95-99.

No Crimes Were Committed

We agree, of course, that prosecution "is not warranted" as to either of these two episodes. But the reason is more fundamental than Mr. McKay's extended discussion warrants. There is no basis for prosecution because any responsible prosecutor would recognize promptly that there was no criminal violation in either event. Nor is this an instance of bona fide disagreement between prosecution and defense.

Opinions of Experts

To prove this point, we requested a highly experienced prosecutor in each area to review all available evidence of knowledge and willfulness and state whether, applying his prosecutorial experience, he believed that there was enough proof of guilt to establish a violation of the cited criminal laws. In each instance, we sought an opinion from a former prosecutor who, in the view of responsible professionals, has had the widest experience supervising or litigating the prosecution of similar cases. And in each instance we selected only one prosecution expert and did not "shop" for a favorable opinion. Each expert was asked to provide his opinion, whether favorable or not, and his fees for services are to be the same irrespective of his judgment. Both prosecution experts disagreed totally and unequivocally with Mr. McKay and his staff as to whether the evidence showed a violation of the criminal law.

Cono R. Namorato

Cono R. Namorato, formerly Deputy Assistant Attorney General of the Tax Division, Department of Justice, and Chief of the Criminal Section of the Tax Division during the Ford and Carter Administrations, reviewed all the facts that Mr. McKay's staff had with respect to the 1985 income-tax return matter. After reviewing those facts and the applicable law, he concluded without qualification that the evidence would not even support a

prima facie case of a criminal tax violation. He concluded that if such a prosecution were brought, the trial court would enter a judgment of acquittal at the close of the government's case. In Mr. Namorato's opinion, based upon years of prosecuting and defending such charges, it is "not even a close case."

Reid H. Weingarten

Reid H. Weingarten, a criminal trial attorney in the Department of Justice's Public Integrity Section until December 1987, has prosecuted many important official corruption cases. Among others, he was the lead counsel in the prosecutions of Judge Walter L. Nixon, Judge Alcee L. Hastings and Congressman George Hansen. We submitted to Mr. Weingarten the facts of Mr. Meese's divestiture of his stock in the "Baby Bell" companies and his subsequent participation in discussions relating to telecommunications matters at the Department of Justice, and we asked Mr. Weingarten whether those facts would support a finding that Mr. Meese had knowingly violated the conflict-of-interest statute, 18 U.S.C. § 208(a). In a detailed written opinion, Mr. Weingarten replied that there was no violation of Section 208(a), thereby disagreeing squarely with Mr. McKay's conclusion.

Unauthorized Pronouncements

It is striking that the two experienced former prosecutors approached would disagree so flatly with Mr. McKay. If, as Mr. Namorato states and as is plain to see, the tax matter is "not even a close case," on what basis can Mr. McKay justify

tarring the reputation of Attorney General Meese by the inclusion of his legal opinion in the official report? The statute does not permit, much less require, him to report his "opinion," perhaps because such opinions by an attorney without experience in the field can be flatly wrong and unjustly damaging.

Lack of Neutrality

The willingness of Mr. McKay to render these "opinions" about "probable" violations of the law reflects on the neutrality of other portions of his report, where he gratuitously suggests that Mr. Meese's "sensitivity" was not what it should have been, or that Mr. Meese should have pursued one course of action over another. His task is not to judge Mr. Meese's sensitivity or priorities, but only to determine whether a criminal prosecution should be initiated.

An Unfair Process

We have prepared this response based on a redacted copy of Mr. McKay's report that was in large part provided to us on July 7. We have not seen the unredacted version, which contains grand jury testimony. Nor have we been given access by Mr. McKay to any grand jury testimony other than that of Mr. and Mrs. Meese, or to interview notes, or to other investigative material gathered by Mr. McKay's office. The immediate question that arises is how much additional information remains in Mr. McKay's files that would exonerate Mr. Meese. Since no criminal prosecution has been filed, Mr. McKay has no legal obligation

under Brady v. Maryland, 373 U.S. 83 (1963), to disclose exculpatory material to us. We requested access to grand jury material upon which Mr. McKay relies, but Mr. McKay's office has opposed our request.

As a result we are severely handicapped in making our presentation on behalf of Mr. Meese. Mr. McKay has sole control of the evidence, has refused to share it with us, and has issued a report summarizing his version of the facts. The report prejudices Mr. Meese with various findings of fact and with adverse conclusions on legal issues. A judge would not be permitted constitutionally to consider evidence submitted ex parte except in the most unusual situations. Yet Attorney General Meese must accept the filing of a public report criticizing his conduct on the basis of such ex parte evidence. And he has no opportunity to examine this evidence and rebut it before filing his own Response. That is, we submit, a patently unfair procedure.

I

**ATTORNEY GENERAL MEESE HAS
BEEN EXONERATED ON QUESTIONS
RELATING TO WEDTECH**

In the "Foreword" to his report, Mr. McKay explains that this investigation of Attorney General Meese was instituted in early April 1987 following allegations received by New York prosecutors from "four former officers of Wedtech who, in January 1987, had entered pleas of guilty to charges of criminal wrongdoing," about actions of E. Robert Wallach involving Wedtech that "possibly implicated" Attorney General Edwin Meese III when he was Counselor to the President between 1981 and 1985 (Report, p. ii). The Justice Department referred these allegations to Mr. McKay at the same time that Mr. Meese requested such a referral. It was thus the Wedtech officers' allegations that formed the basis of Mr. McKay's inquiry.

A. Mr. McKay's Investigation Found No Evidence That Mr. Meese Acted Improperly in Connection With Wedtech.

After a "full investigation of Mr. Meese's financial affairs from 1981 through 1986" (Report, p. 1), Mr. McKay's report exonerates Mr. Meese on any and all Wedtech-related allegations. It finds that there is "no substantial evidence that Mr. Meese's involvement with matters concerning Welbilt/Wedtech violated any criminal law" (Report, p. 132). The report finds, similarly, that there is not "any evidence that Mr.

Meese, at any time, knowingly received any money or thing of value from anyone in return for or on account of any official act he performed which benefited the company" (Report, p. 20). Mr. McKay reiterates this conclusion again when he states that "there is insufficient evidence to conclude that Mr. Meese committed any criminal offense under the bribery or gratuities provisions of 18 U.S.C. § 201, or under 18 U.S.C. § 211" (Report, p. 100).

These findings corroborate Attorney General Meese's repeated public statements that he committed no improper or illegal act in relation to the Wedtech Corporation. It refutes the allegations made fourteen months ago by acknowledged felons that initiated this investigation of the Attorney General and generated the ensuing barrage of media attacks.

B. The Report Also Refutes the Allegations Regarding Wedtech that Have Been Made on Capitol Hill and in the Press.

Besides finding that there was no illegality in Mr. Meese's Wedtech "involvement," Mr. McKay's detailed review of the evidence pertaining to Wedtech vindicates the Attorney General on various allegations made from different sources:

(1) No benefits were ever received from Wedtech by Mr. Meese.

The McKay investigation began in an effort to determine whether Mr. Meese received anything of value from Wedtech in

return for his limited involvement in the Military Standard Engine contract award in 1982. Mr. McKay, after a thorough investigation, has concluded that there is no evidence that "any payment was made by Wedtech directly or indirectly to Mr. Meese" (Report, p. 273). With respect to the Meese Partners account, he has found "no evidence of a connection between Mr. Chinn's management of Meese Partners and the Wedtech Corporation" (Report, p. 286), "no evidence of any contribution to the Meese Partners account by Wedtech or any third party" (Report, p. 324), and no evidence that any "benefits accrued to Mr. Meese by virtue of the fact that Mr. Wallach, Mr. Chinn and Dr. London had a business relationship with Wedtech" (Report, p. 352). Even more comprehensively, Mr. McKay states that no evidence was discovered (Report, p. 20):

that Mr. Meese, at any time, knowingly received any money or thing of value from anyone in return for or on account of any official act he performed which benefited the company.

The report's conclusions make clear that Mr. Meese derived no personal benefit of any kind from the limited actions he took with respect to Wedtech.

- (2) Mr. Meese never knew Mr. Wallach may have used his name to obtain funds from Wedtech.

It has been alleged that Mr. Meese assisted Wedtech to further the financial interests of his friend E. Robert

Wallach. Mr. Meese has repeatedly stated and testified that he knew only that, at some point, Mr. Wallach was acting as an attorney for Wedtech. He had no knowledge either of the size of Mr. Wallach's fee or of the fact that Mr. Wallach received stock in the company. Indeed, Mr. McKay refutes decisively the suggestion that Mr. Meese took the limited actions he did with any intent of furthering Mr. Wallach's financial interests. With respect to Wedtech, he finds (Report, p. 105):

There is no substantial evidence that Mr. Meese was motivated to take his actions by any consideration other than his friendship for Mr. Wallach. The evidence does not establish that he was even aware at that time of the nature or extent of Mr. Wallach's prospective financial interest in the success of Welbilt/Wedtech.

Similarly, for the full period of 1983 to 1986 (which is the only period when Mr. Wallach was compensated by Wedtech), Mr. McKay has found no evidence (Report, p. 260):

that Mr. Meese was aware of the fact that Mr. Wallach was obtaining money from Wedtech by exploiting his access to and friendship with Mr. Meese.

We do not know whether there is any truth to the assertion that Mr. Wallach was "exploiting" access to Mr. Meese. Nor do we know what financial agreements Mr. Wallach made with Wedtech and the basis for those agreements. But whatever they may have been, it is clear that Mr. McKay's investigation exonerates Mr. Meese from any participation in, or knowledge of, the financial terms of Mr. Wallach's arrangements with Wedtech and Mr. Wallach's statements to the company's officers.

(3) Mr. Meese was not involved in Wedtech matters after July 1983.

Suggestions have appeared in the press that Mr. Meese was involved in Wedtech's efforts to obtain the Navy pontoon contract, including an allegation that the nomination of Everett Pyatt, Jr., as Assistant Secretary of the Navy for Shipbuilding and Logistics was deliberately held up in order to pressure him to award the pontoon contract to Welbilt. Mr. McKay's report refutes these allegations completely. For example, Mr. McKay concludes without qualification that he "has discovered no competent evidence of any actions relating to Welbilt/Wedtech taken by Mr. Meese after July of 1983" (Report, p. 132).

With respect to the Pyatt nomination, Mr. McKay's report finds no relation whatever to Wedtech (Report, p. 225 n.111):

The evidence known to the independent counsel shows that Mr. Pyatt's nomination was first delayed and then released because of a separate controversy which did not involve Wedtech or Mr. Wallach.

Similarly, Mr. McKay's report finds that an October 1984 memorandum that briefly referred to the contract was the only known communication between Mr. Wallach and Mr. Meese about the pontoon contract. The report concludes that (Report, p. 234):

the evidence currently available ^{*}/ does not indicate that Mr. Meese took any action after 1983 to assist Wedtech in connection with its efforts to obtain the pontoon contract, or to assist in any other matters of interest to Wedtech.

- (4) Mr. Meese's telephone conversation with Secretary of Commerce Baldrige was purely informational.

There have been recent allegations, based upon triple hearsay, that in July 1983, Mr. Meese called Secretary of Commerce Malcolm Baldrige early in the morning, brought him out of the shower at home, and attempted to lobby him to approve a loan subordination for Wedtech at the Economic Development

^{*}/ The words "currently available" are misleading because all persons with knowledge have testified or answered questions. Mr. Wallach said the following in a September 1987 interview:

Q. Do you have any -- one final question -- any personal recollection, any recollection, apart from referring to documents that have been shown to you, of asking Mr. Meese at any time to intervene on Wedtech's behalf with respect to the Pontoon causeway contract matter at any time from '83 to date?

A. I have no recollection of ever asking him to intervene on behalf of Wedtech as it relates to any aspect of the Pontoon contract.

Q. Do you have any recollection of asking him to have others intervene on behalf of Wedtech?

A. Not that I remember. I don't think Jim Jenkins was involved with the Pontoon contract at all while he was in the White House.

Administration. The allegation is false, as the facts set forth in Mr. McKay's report show.

The report unequivocally concludes that the ultimate decision by the Department of Commerce with respect to the loan subordination decision was made by the Department "on the merits" (Report, p. 131).

Moreover, the report finds that no one who participated in the ultimate decision recalled any relevant involvement or request by Secretary Baldrige. Helen W. Robbins, Secretary Baldrige's chief-of-staff, "did not know of any telephone conversation between Secretary Baldrige and Mr. Meese about Welbilt" (Report, p. 209). The report states that she "did not believe Secretary Baldrige was ever involved in the Welbilt matter" and that she "had no recollection of any involvement or request by Secretary Baldrige relating to the [loan subordination] matter" (Report, pp. 209-210). Similarly, Irving P. Margulies, Deputy General Counsel of the Department of Commerce, stated that he was "absolutely certain that he was not contacted about Welbilt by Secretary Baldrige, by Mr. Meese or by Mr. Nofziger" (Report, p. 211). Indeed, Carlos C. Campbell, Assistant Secretary for Economic Development and the person who made the ultimate decision on the loan subordination matter, stated "that he never spoke with Secretary Baldrige about the Welbilt matter and he received no directions or instructions from Secretary Baldrige" (Report, p. 214).

Finally, Mr. Meese's own handwritten note of a telephone conversation with Secretary Baldrige on July 15, 1983, refutes

the allegation. The note indicates that the telephone call was placed by Secretary Baldrige at 5:05 p.m. No credibility, therefore, can be given to the story that Mr. Meese "called Secretary Baldrige while he was in the shower" to pressure him on the loan question. And, as Mr. Meese testified, his note of the telephone conversation indicates simply that Mr. Baldrige "informed him of the status of the Welbilt matter" (Report, p. 209). There is no indication from this note, or from any other testimony, documents or surrounding circumstances, that Mr. Meese was in any way pressuring Secretary Baldrige on behalf of Welbilt.

(5) Mr. Meese was not involved in the
Justice Department's investigation
of Wedtech.

There have been repeated suggestions that Mr. Meese improperly failed to recuse himself from the Department of Justice's Wedtech investigation, which commenced during the summer of 1986. Mr. McKay's report makes clear that such criticism is completely unfounded.

The report finds that the Wedtech criminal investigations "were brought to the attention of Mr. Meese when he learned in early November 1986 of the possible involvement of Mr. Nofziger" (Report, p. 283). After that date, the only other evidence of his contact with the investigation was a routine notification that he received regarding subpoenas that had been issued to Congressman Biaggi. Mr. McKay's investigation dis-

closes that at no other time did Mr. Meese learn any details of the Wedtech investigation, and at no time did he provide "any information of any kind relating to the investigation to anyone outside the Department of Justice" (Report, p. 285). As soon as Mr. Meese was notified on April 6, 1987, that Mr. Wallach was the subject of a federal criminal investigation of Wedtech, Mr. McKay states, "he immediately recused himself from all further participation in Wedtech matters" and "ceased consulting with Mr. Wallach on matters relating to the Department of Justice" (Report, p. 284).

These factual findings are completely consistent with Mr. Meese's recollection that he was not involved in the Wedtech investigation. His recusal followed immediately upon his notification that Mr. Wallach had become a subject of the investigation. There is, therefore, absolutely no basis for any criticism of Mr. Meese with respect to the timing of his recusal from the Wedtech investigation.

C. Mr. Meese Had a Very Minor Role in the Military Standard Engine Contract Matter.

The fundamental conclusions and findings of fact that appear in the Wedtech portion of Mr. McKay's report are correct and they exonerate Mr. Meese. But Mr. McKay frequently characterizes the facts in terms that are misleading and inaccurate.

- (1) Mr. Meese did not personally intervene with the Small Business Administration or the Department of the Army.

Mr. McKay states, "Mr. Meese, then Counselor to the President, and his staff, intervened with officials of the Small Business Administration ('SBA') and the Army to facilitate Welbilt's obtaining [the Military Standard Engine] contract" (Report, pp. 130-131). He asserts, similarly, that Mr. Wallach "repeatedly sought and obtained Mr. Meese's intervention to support Welbilt's efforts to be awarded the government contract" (Report, p. 13). Insofar as they describe Mr. Meese, these statements are simply untrue, and Mr. McKay has not cited a shred of evidence to support them. Mr. McKay interviewed former Secretary of Defense Weinberger, Secretary of the Army Marsh, former Administrators of the SBA James Sanders and Michael Cardenas, and all of the Army and SBA personnel who were involved in the military standard engine contract matter. Not one of them stated that Mr. Meese ever contacted them, much less "intervened to facilitate" Welbilt's efforts with respect to the contract. Mr. McKay has not pointed to a single document indicating that Mr. Meese personally intervened in the matter. The statement is simply untrue. Indeed, even Mr. McKay at one point concedes that Mr. Meese "did not directly intervene" to assist the company (Report, p. 14).

- (2) Mr. Meese only requested his staff to look into the matter to see that Welbilt was being treated fairly.

From the time press accounts regarding Welbilt first appeared, Mr. Meese has stated that his involvement was limited to asking his staff to look into the matter to see that Welbilt was being treated fairly. Mr. McKay takes issue with this statement and characterizes the evidence as indicating that Mr. Meese "did far more than to make sure that Welbilt was being treated properly or fairly by the Army" (Report, p. 144).

Mr. McKay's characterization is belied by the very evidence he cites. There are only two references in Mr. McKay's report to Mr. Meese's involvement in the military standard engine contract matter and neither supports the conclusion that Mr. Meese "did far more" than request a fair hearing for Welbilt.

First, Mr. McKay states that "the evidence . . . shows that Mr. Meese, upon receiving Mr. Wallach's request for assistance, directed his staff to provide assistance to Mr. Wallach on the Welbilt matter" (Report, p. 143). Mr. McKay then describes two status inquiries to the SBA from T. Kenneth Cribb of the Office of Cabinet Affairs following Mr. Meese's request to his staff (Report, pp. 143, 149-150, 159-160), and one instance in which Mr. Cribb and Mr. Meese actually met to discuss the matter. Indeed, even the two memoranda that Mr. Cribb prepared following his status inquiries to the SBA were addressed to another member of Mr. Meese's staff, not to Mr. Meese himself.

Second, Mr. McKay states the undisputed fact that Mr. Meese "authorized his Deputy, Mr. Jenkins, to take affirmative action in the matter" (Report, p. 168). This authorization to Mr. Meese's deputy was not intervention to win the contract for Welbilt; it was only a request that Mr. Jenkins ensure that Welbilt was being treated fairly. During the Nofziger trial, Mr. Jenkins made it very clear that Mr. Meese's direction to him was not to ensure that Welbilt received the contract, as Mr. McKay implies.

Mr. Jenkins stated:

Q. All right. So is it your testimony here today that at no time Mr. Meese gave you the assignment of following the efforts of Welbilt to obtain the contract?

A. That is correct.

Nor is it true, as Mr. McKay asserts, that Mr. Meese "was aware of and sanctioned the actions of his staff" (Report, p. 178). Even an internal note written by a Welbilt official in June 1982 states that, based upon his conversation with Mr. Wallach, he understood that "the matter will be handled by Jenkins, most likely, and not by Ed" (Report, pp. 176-177). This is hardly evidence of the close and detailed awareness that Mr. McKay implies with his broad characterizations of Mr. Meese's involvement. The fact is that Mr. Jenkins proceeded as he saw fit and that Mr. Meese was not aware of the details of Mr. Jenkins' activities regarding Welbilt in 1982. No facts are to the contrary.

- (3) Mr. Meese did not intercede in the decision of the Department of Commerce to subordinate Wedtech's loan from the Economic Development Administration.

Mr. McKay asserts that Mr. Meese "at Mr. Wallach's request also interceded in connection with Welbilt's efforts to secure the Economic Development Administration's approval of private financing arrangements which Welbilt needed to avoid bankruptcy" (Report, pp. 15, 36, 216). Again, however, this assertion of an "intercession" by Mr. Meese is belied by the evidence presented in Mr. McKay's own report. All that this evidence shows is that Mr. Meese once briefly discussed with Mr. Baldrige the "status of the Welbilt matter" (Report, p. 209). There is no evidence that Mr. Baldrige thereafter took any action on the Welbilt matter, sought to influence the Department's decision in any way, or mentioned to anyone his conversation with Mr. Meese. Indeed, as discussed earlier, the clear recollection of all of the parties involved, expressed to Mr. McKay's office, was that Mr. Baldrige had no such involvement. Thus, there is simply no way that Mr. Meese's call, as Mr. McKay asserts, "may have contributed to [the] atmosphere of pressure" surrounding the loan issue. As Mr. McKay finds, the Department of Commerce's decision on the loan subordination issue was made "on the merits" (Report, p. 131), and with no input, much less "intercession," by Mr. Meese.

D. Mr. Meese Acted Correctly in Responding to Mr. Nofziger.

Mr. McKay suggests that Mr. Meese should have raised a question "about the propriety of Mr. Nofziger's contacts on the Welbilt matters" and that he should have done something to "discourage them" (Report, p. 168). This is a wholly unjustified criticism. There was only a single contact between Mr. Nofziger and Mr. Meese on the subject of Welbilt, not the multiple contacts that Mr. McKay asserts. And there is no evidence to suggest that Mr. Meese knew that Mr. Nofziger had been retained by Welbilt before Mr. Nofziger made his suggestion. Mr. Meese told Mr. McKay's staff and testified at the Nofziger trial that he and Mr. Nofziger frequently discussed public relations and political questions after Mr. Nofziger left the White House. The April 8, 1982, memorandum that Mr. Nofziger sent to Mr. Meese regarding Welbilt clearly came within the category of political advice. Mr. Nofziger advised Mr. Meese that it "would be a blunder not to award that contract to Welbilt" because "[t]he symbolism either way is very great." Mr. Meese believed that this time, as on many other occasions, Mr. Nofziger was providing advice on a political issue relating to the Administration, not lobbying for a client. */ Nothing in the memorandum or in the brief conversation with Mr. Nofziger would have placed Mr. Meese

*/ Indeed, in early April 1982, even Jim Jenkins did not know that Nofziger & Bragg were representing Welbilt, and he so testified at the Nofziger trial.

on notice of a possible Ethics in Government Act violation that he should have "discouraged."

E. The Testimony of Witnesses Who Invoked the Fifth Amendment Would Further Exonerate Mr. Meese.

Misleading suggestions appear throughout Mr. McKay's report that he has been deprived of "critical" evidence because Messrs. Wallach, Chinn and London have invoked their privilege against self-incrimination. In fact, Mr. Wallach appeared before the grand jury on March 17, 1987, and, without invoking any privilege, answered, under oath, all questions put to him concerning Wedtech. In September 1987, Mr. Wallach was interviewed by Mr. McKay's staff in Mr. McKay's office. At the beginning of the session, the Deputy Independent Counsel described the state of her knowledge as follows:

You [Mr. Wallach] have previously testified before a grand jury in this jurisdiction. You have also, before that grand jury appearance, you submitted to an interview with Mr. McKay and Ms. Coleman.

Before that, you were interviewed in the Southern District of New York by a special agent Tom Walsh and others who were present at that interview.

So, we do have a wealth of information already in our files and in our collective memory banks. So I don't want to go over every detail that has already been covered.

Mr. McKay describes the September 1987 session as an "unsworn deposition" in which Mr. Wallach answered only "a limited number of questions" (Report, p. 4). This description is seriously inaccurate. Mr. Wallach actually answered questions

from 10 a.m. until 7 p.m. The transcript of the session covers 325 pages, exclusive of exhibits. False statements, even if unsworn, would be punishable under 18 U.S.C. § 1001. Mr. Wallach was asked, and answered, more than 650 questions relating to his relationship with Mr. Meese and any communications he had with Mr. Meese on "matters of public, professional, or personal interest," including Wedtech, Mr. Wallach's appointments to government posts, and his involvement in the Wedtech criminal investigation. The only subjects that were excluded were Mr. Wallach's communications with Wedtech officers, his compensation from Wedtech (that had been the subject of his testimony before a Senate Subcommittee), his relationship with Mr. Chinn and Mr. London, and the Aqaba pipeline project. Mr. Wallach's testimony was entirely exculpatory of Mr. Meese.

Mr. Chinn and Mr. London similarly informed Mr. McKay's staff, through counsel, that they had no incriminatory or derogatory evidence regarding Mr. Meese. We have attached to this Response copies of letters received from counsel for Messrs. Wallach, Chinn and London which demonstrate that with respect to Mr. Meese these men have nothing but exculpatory evidence to provide. See Appendices 3, 4, and 5.

The unfairness of Mr. McKay's suggestion is underscored by the fact that, if he had so desired, he could have obtained the full and complete testimony of each of these individuals, under oath and before the grand jury, by providing limited statutory immunity to them, as he did to other witnesses in the case (e.g., Report, p. 352). Nothing prevented Mr. McKay from

embarking on this course. Indeed, we urged him to do so in December 1987. Mr. McKay has been deprived of "critical evidence" only because of his conscious and deliberate decision not to seek it.

II

**THE REPORT ESTABLISHES THAT
MR. MEESE'S INVESTMENT WITH
FRANK CHINN WAS LAWFUL AND PROPER**

Various allegations have been made in the press and on Capitol Hill concerning Mr. Meese's investments with Frank Chinn. It has been asserted that because of Mr. Chinn's involvement with Wedtech there was a relationship between the Meese Partners investments and Wedtech, or that the Meeses' funds had been used to buy Wedtech stock. Others implied that the Chinn investment was a disguised means of benefiting Mr. Meese. And as to the investments themselves, it has been suggested that improper loans were effectively made to Mr. Meese for large stock purchases through Mr. Chinn and that Mr. Wallach's funds, as invested with Mr. Chinn, were used through an alleged "pooling" arrangement for Mr. Meese's benefit. Finally, it was asserted that Mr. Meese was responsible for the kind of stock trading that Mr. Chinn did on the Meese Partners account. (The last two allegations were made by Senator Carl Levin in a majority staff report issued March 1, 1988, by the Senate Subcommittee on Oversight of Government Management and in a simultaneously released letter to the Office of Government Ethics.)

Mr. McKay's report conclusively puts these allegations to rest with a number of findings.

A. There Was No Relationship Between Wedtech and Meese Partners.

Mr. McKay concludes that there is not "any evidence of a connection between Mr. Chinn's management of Meese Partners and the Wedtech Corporation" (Report, p. 286).

B. The Meeses' Funds Were Not Invested in Wedtech.

Mr. McKay finds, similarly, that "[a]t no time did Mr. Chinn purchase or trade Wedtech securities for the Meese Partners accounts" (Report, p. 324).

C. Mr. Meese Was Not "Paid Off" Through Mr. Chinn's Investments.

The report makes clear that the Chinn investment did not represent any disguised means of benefiting Mr Meese. Mr. McKay concludes that "no benefits accrued to Mr. Meese by virtue of the fact that Mr. Wallach, Mr. Chinn and Dr. London had a business relationship with Wedtech" (Report, p. 352). He states, similarly, that while Mr. Chinn's investment services "may have been unusual," there is "no evidence that Mr. Meese illegally or improperly benefited from them" (Report, p. 285).

Moreover, Mr. McKay finds that while Mr. Chinn's management of the Meese Partners account may have been "slightly preferential" in its "day-to-day management" -- although not in terms of its overall return (Report, p. 23) -- there is "no evidence that Mr. Meese knew of any preferential treatment

arising from Mr. Chinn's management of Meese Partners" (Report, p. 285). As he concludes (Report, pp. 323-324, 352):

Although there are indications that Mr. Chinn exercised his discretion so as to favor Meese Partners to a limited extent, there is no evidence that Mr. Meese knew of any such favored treatment, nor is there any evidence that any such treatment was a quid pro quo for any official act performed by Mr. Meese.

* * * *

The independent counsel has determined that there is no substantial evidence that Mr. Meese's relationship with Mr. Chinn involved acceptance by Mr. Meese of anything of value from Mr. Chinn or from Mr. Wallach for or because of an official act by Mr. Meese.

D. No Loans Were Made to Mr. Meese Through the Meese Partners Accounts.

Directly contrary to suggestions made by Senator Levin, Mr. McKay finds that there were no improper loans effectively made to Mr. Meese for large stock purchases. He concludes that there is "no evidence of any contribution to the Meese Partners accounts by Wedtech or any third party" (Report, p. 324). He also states (Report, p. 343):

The independent counsel has found no evidence that Mr. Chinn opened a margin account for Meese Partners, or that Mr. Chinn owed any money to his clearing firm for transactions on behalf of the Meese Partners account.

E. Mr. Meese's Account Was Not "Pooled" With Others.

Mr. McKay similarly refutes Senator Levin's suggestion that there was use, for Mr. Meese's benefit, of funds invested by Mr. Chinn or Mr. Wallach. He concludes flatly that Mr. Chinn

"did not pool his clients' funds in one account; instead, he maintained separate accounts for each customer" (Report, p. 298).

F. Mr. Meese Was Not Responsible for Mr. Chinn's Trading Practices.

There has also been criticism of Mr. Chinn's trading practices -- a subject that we do not address and on which we have no opinion. But Mr. McKay finds that there is no evidence "that Mr. Meese had any knowledge of Mr. Chinn's complex arrangements and techniques" (Report, pp. 299; see also Report, pp. 24, 343). He concludes that any conduct Mr. Chinn may have engaged in "cannot be attributed to Mr. Meese." As he explains (Report, p. 343):

It would be unusual for an investor to be aware of the clearing arrangements used by his money manager. There is no evidence that Mr. Meese had any knowledge of the investment arrangements used by Mr. Chinn to effect transactions for Meese Partners.

Mr. McKay concludes, in any event, "that Mr. Chinn's questionable activities did not provide any improper benefit to Mr. Meese" (Report, p. 23).

G. Mr. Meese's "Above Average" Return From His Investments Was Not Exceptional.

Finally, there have also been suggestions that the rate of return that Mr. Meese received from the Meese Partners account was unusually high, and that Mr. Meese should be faulted for Mr. Chinn's "risky" investment practices. Mr. McKay's report refutes these suggestions as well. It finds that the return that the

Meeses received on their investments -- "an annual overall rate of return of approximately 24.8 percent" (Report, p. 325) -- could well have been obtained from other money managers. */ Mr. Chinn "was not the only able money manager who enjoyed great success in handling investment portfolios for clients during this period of rising stock values" (Report, p. 111 n. 46). Indeed, Mr. McKay notes that three "recognized investment indices . . . increased at high annual rates over the same period" (Report, p. 326).

There is, in short, no basis whatever for any of the allegations, innuendoes and false inferences that have swirled around the Meese Partners account for the past year. There was absolutely nothing improper about Mr. Meese's involvement with the account.

*/ This reported rate of return, which is essentially accurate, refutes the frequent assertions by Senator Levin and others that the Meeses were receiving returns of "80%" over "a short period."

III

**MR. MEESE'S CONDUCT WITH RESPECT
TO THE MISPLACED "BABY BELL" STOCK
CERTIFICATES WAS IN KEEPING WITH
THE LETTER AND SPIRIT OF THE
CONFLICT-OF-INTEREST LAWS**

When Mr. and Mrs. Meese transferred away all their stock after he became Attorney General in 1985, they were unable to find the stock certificates for 17 shares of each of the seven "Baby Bell" companies. Faced with a deadline, they executed a "Transfer of Property" document which assigned to Mr. Chinn the ownership of the lost certificates. Mr. McKay now opines -- three years later -- that the "Transfer of Property" document was legally invalid. Based upon this after-the-fact legal opinion, Mr. McKay declares, in a wholly gratuitous portion of his report, that Mr. Meese "probably violated" a provision of the federal conflict-of-interest laws (18 U.S.C. § 208(a)) because he was present at Justice Department meetings in 1985 and 1986 when certain telecommunications issues were discussed (Report, pp. 27, 53-72). We term Mr. McKay's opinion "gratuitous" and believe it exceeds his lawful authority because the independent counsel statute gives him no power to issue opinions of law. The only matters he is empowered to include in his final report are a "description" of his work and "the reasons for not prosecuting any matter."

Mr. McKay explains his reasons for not prosecuting Mr. Meese on the conflict-of-interest allegations as follows (Report, pp. 74-76):

- (1) Mr. Meese did not act "from motivation for personal gain" or "out of self-interest."
- (2) Mr. Meese took steps to divest himself of the stock that created the conflict-of-interest.
- (3) Mr. Meese "did not alter in any way the course of Department of Justice policy." The same decisions would have been reached without his involvement.
- (4) Mr. Meese had been granted a waiver of the conflict-of-interest law for essentially the same conflict when he was Counselor to the President.
- (5) Mr. Meese was subsequently granted a waiver for this very same conflict.

These same reasons, however, make it plain that there was never even a technical violation of 18 U.S.C. § 208(a). Mr. McKay is entirely wrong in his analysis of the law, and we believe that his judgment would not be upheld if he were an ordinary federal prosecutor seeking to indict a less prominent defendant on the same facts.

The essence of Mr. McKay's position is that Mr. Meese attempted to divest his ownership in the "Baby Bell" stocks but that attempt was, in Mr. McKay's opinion, unsuccessful. As a result, Mr. Meese is labelled a felon by Mr. McKay for failing to recognize the inadequacy of the divestiture. According to Mr. McKay, Mr. Meese has acted criminally because he "should have known" of this conflict of interest (Report, p. 355). This is an unjust misapplication of established principles of criminal law.

We submitted a comprehensive legal memorandum to Mr. McKay and his staff when the issues growing out of Mr. Meese's misplaced certificates arose. We presented four distinct legal arguments as to why Section 208(a) was not violated on the facts of this case. Mr. McKay's report does not meet these contentions. Nor can Mr. McKay cite a single precedent involving facts remotely close to this case to support his startling interpretation.

Our difference with Mr. McKay on this subject is not simply the view of defense lawyers. We were so astonished that Mr. McKay could conclude, on these facts, that there was a violation of 18 U.S.C. § 208(a) that we sought an impartial opinion from an experienced prosecutor. The individual we consulted, who has recently prosecuted a number of highly publicized trials of federal officials charged with violations of the public integrity laws, is Reid H. Weingarten, who was a federal prosecutor until December 1987. Mr. Weingarten was the chief federal prosecutor in the cases brought against Congressmen George Hansen and John Jenrette, and Judges Alcee Hastings and Walter Nixon. Mr. Weingarten was the only expert whom we consulted on this aspect of the investigation, and we retained him to provide a disinterested judgment as to whether the evidence of Mr. Meese's knowledge would justify a criminal indictment under 18 U.S.C. § 208(a). Mr. Weingarten's conclusion -- which conflicts squarely with that of Mr. McKay -- appears as Appendix 1. He has determined that the admissible evidence of knowledge would not be sufficient to obtain or sustain a

conviction under 18 U.S.C. § 208(a). The following analysis of the facts explains why Mr. Weingarten's conclusion is valid and Mr. McKay's is not. These facts also show, in conjunction with Mr. Weingarten's opinion, why an experienced prosecutor would not view these facts as establishing a violation of 18 U.S.C. § 208(a).

A. Mr. Meese Did Not "Know" He Retained Any Financial Interest in the "Baby Bell" Companies After He Signed the "Transfer of Property" Document.

The most fundamental element in any violation of 18 U.S.C. § 208(a) is the element of "knowledge." An accused cannot violate that provision of law if he does not actually and subjectively know that he owns stock or some other property that would be affected by a governmental decision in which he participates. In this case, there simply is no proof of such knowledge. Without it, however, there can be no violation of Section 208(a).

To establish a violation of Section 208(a), a prosecutor must prove actual subjective consciousness of ownership by the accused. In his testimony before the grand jury, Mr. Meese could not have been clearer in stating what his knowledge and belief were at the time. He explained that the "whole purpose" of the Transfer of Property document "was to divest myself of the stock by the date that was necessary, which was the 24th of May, or the 25th of May, and so that was the reason for transferring all of

my title and interest and that of my wife to Mr. Chinn." ^{1/} When Mr. Meese was asked if he became concerned, as time went on, about the validity of his May 1985 recusal policy, he answered unequivocally: "No, I really didn't because I had divested all of my ownership of the stocks, and it was on that basis that I was acting." Mrs. Meese similarly testified that it was her understanding that "we had signed all interest in all of our securities over to Mr. Chinn." Moreover, as Mr. McKay acknowledges, Mr. Meese's note transmitting the transfer document to Mr. Chinn stated that he was "transferring to [him] various shares of stock" (Report, p. 380). Mr. Meese also wrote simultaneously to Department of Justice officials that the stocks "had been divested" (Report, p. 381).

That is the only direct evidence in Mr. McKay's possession relating to the critical question of Mr. Meese's state of mind with respect to his ownership of the "Baby Bell" stocks during the relevant time period. No evidence contradicts it. And all other circumstantial proof points repeatedly in the same direction -- that Mr. Meese showed time and again that he actually believed that he had no ownership interest, other than bare legal title, in the "Baby Bell" stocks.

^{1/} In another exchange, Mr. Meese similarly explained his understanding of the Transfer of Property Document:

- Q. How would you characterize this transfer agreement?
- A. This was a transfer of all my right, title and interest, in the -- and my wife's, in the specified shares of these seven stocks.

- (1) The Attorney General directed his chief-of-staff to draft a document that would effectively transfer ownership.

When it was discovered in May 1985 that the "Baby Bell" stock certificates were missing, Mr. Meese told John N. Richardson, Jr., his chief-of-staff, to draft a document that would transfer to Mr. Chinn all of the Meeses' beneficial interest in the seven corporations. Mr. Richardson, who is a member of the Virginia bar, undertook to carry out that instruction. Mr. McKay's report describes Mr. Richardson's belief that the document effectively divested the Meeses' interest in the shares (Report, p. 378):

Mr. Richardson's understanding of the transfer document was that it constituted an outright assignment of all the right, title and interest of Mr. and Mrs. Meese in the RBOC stock to Mr. Chinn "except for the technical legal title."

According to the report, Mr. Richardson similarly told Janice Sposato, the Department of Justice Ethics Officer, that "Mr. Meese had divested the AT&T and RBOC holdings" (Report, p. 381).

Mr. Meese testified with respect to his instructions to Mr. Richardson as follows:

Q. Your thought processes at the time, you mentioned earlier that Mr. Richardson drafted this agreement for you?

A. I believe he did, yes.

Q. How did that come about?

A. Well, we were talking about how to handle this situation of the lost certificates and having a deadline for divesting myself and my wife of our interests, and so we thought that the best way to do it would be to transfer and divest ourselves of the interests by transferring the stocks even without the certificates to Mr. Chinn, just as we had transferred all of the stocks for which we had certificates.

Having communicated a specific instruction to draft an effective transfer document to a qualified attorney who was handling important legal questions on behalf of the Attorney General and who, in Mr. McKay's words, was the staff member with "responsibility for ethics matters" (Report, p. 378), Mr. Meese surely had every reason to assume that the legal document implemented his instructions. Mr. Richardson knew, after all, that this was designed to effectuate a promise that the Attorney General had made to the Senate.

There is no evidence that contradicts Mr. Richardson's and Mr. Meese's recollections of these events. They provide incontrovertible proof of Mr Meese's state of mind -- that he intended to divest himself of the seven company stocks and believed that he had, in fact, done so.

(2) The "Transfer of Property" document had binding legal effect.

There is no meaningful discussion in Mr. McKay's report of the legal effect of the May 23, 1985, "Transfer of Property" document. Mr. McKay simply declares, on his own authority, that

"as a matter of fact and as a matter of law the document did not, divest Mr. Meese of his financial interest in the RBOC stock" (Report, pp. 65, 388). Without a single legal citation, Mr. McKay announces that the document turned Mr. Chinn into an "agent or trustee" of the shares, but not their owner (Report, p. 388). He also declares that "[t]he document did not attempt, and was not intended, to shift the financial risk from Mr. Meese to Mr. Chinn" (Report, p. 66). These are wholly unsupported declarations. They are wrong, and they are contrary to the many judicial precedents that were cited for Mr. McKay in a legal memorandum submitted to him on February 24, 1988. Appendix 6 to this Response is a copy of our legal memorandum demonstrating the binding nature of the "Transfer of Property" document.

Mr. McKay may be unhappy that the "Transfer of Property" document is short, but effective legal documents need not be prolix or contain many legalistic paragraphs. Mr. McKay asserts that the document did not "shift the financial risk from Mr. Meese to Mr. Chinn." For the reasons stated in our memorandum, we believe it did shift the financial risk, even though Mr. Meese candidly and repeatedly acknowledged in his testimony that he did not consciously consider the question of risk-shifting when the document was drafted. From the time he received the "Transfer of Property" document, Mr. Chinn was legally entitled to sell all the interest transferred to him. Indeed, if substitute stock certificates had been provided to Mr. Chinn at a later date and he had wanted to keep the difference between the value of the stock on May 23, 1985, and the date of receiving the new

certificates, he would have been within his rights to do so. The document stated that the ultimate sale of the stocks was to be within Mr. Chinn's "sole discretion" (Report, p. 379).

How can Mr. McKay fairly allege that the Attorney General committed a felony if he is unable to establish -- apart from his own unsupported pronunciamento -- that the formal document drafted by an attorney to achieve full divestment of the Meeses' ownership failed legally to accomplish that objective? The document specified the particular stock interests that were being transferred, it named the person to whom the interests were assigned, it transferred "all right, title, and interest" in the enumerated companies, and the document was sent to Mr. Chinn as proof of his ownership. The document was, in every meaningful sense, a valid legal transfer.

- (3) Mr. Meese had no reason to doubt the validity of the "Transfer of Property" document.

In any case, Mr. McKay's after-the-fact views as to the legal validity of the transfer document are irrelevant to the question of Mr. Meese's knowledge and intent. The ultimate question, in terms of criminal liability, is not whether a judge, ruling on the question today, would find that the document drafted by Mr. Richardson failed to transfer the Meeses' ownership. It is whether Mr. Meese, in good faith, believed that it had accomplished that purpose.

Mr. McKay does not question Mr. Meese's state of mind -- to which Mr. Meese is the best witness and on which he testified under oath. Indeed, Mr. Meese's testimony, set forth above, is not only uncontradicted, but it is supported by the other persons, such as Mr. Richardson, who had contemporaneous knowledge of his state of mind. Mr. McKay, faced with this critical failure of proof, chooses to ignore the issue. He arrives at his result "[w]hatever may have been Mr. Meese's intentions when he requested his aide to draft the document" (Report, p. 65), and "[w]hatever may have been Mr. Meese's intentions when he executed the Transfer of Property document" (Report, p. 66). Mr. Meese's intentions at both those times -- when he asked that the document be drafted and when he signed it -- are highly relevant. If, as is undisputed, he expected and understood that the document would divest his and his wife's stock interests, he cannot be labelled as criminally liable because the legal advice he received from his chief-of-staff is second-guessed three years later.

- (4) Mr. Meese believed that Mr. Chinn would have the benefit of any increase in the value of the stock.

As Mr. McKay's own recitation of Mr. Meese's testimony discloses, Mr. Meese had not focused in 1985 on who would benefit or suffer from gain or loss in the value of the stock transferred by the "Transfer of Property" document (Report, p. 384; "so the issue never came up, and actually I didn't go into all of these

details even in my thought processes"). Rather than proving that he had culpable knowledge that he continued to bear the risk of loss, as Mr. McKay suggests, this omission demonstrates innocence.

But even if Mr. Meese's later views on the legal effect of the document with respect to the "risk of loss" were the correct issue, his views clearly support the conclusion that he did not believe he held an ownership interest in the stock in 1985 and 1986. Mr. Meese explained to Mr. McKay that "legally he [Chinn] was probably obligated to pay me whatever value the stock had at the time that it was transferred to him" (Report, p. 383). When he was asked specifically who was entitled to benefit from any gain in the value of the stock after May 23, 1985, Mr. Meese replied, "I don't think I would have been entitled to the gain, but I'm not sure" (Report, p. 383).

On further questioning, Mr. Meese explained his reasoning in greater detail (Report, p. 383):

He could not be obligated to give me more than what I gave him, than what I transferred to him on the 23rd of May. At least he would have a decent theory of [sic] that.

Ignoring Mr. Meese's testimony, Mr. McKay first asserts in his "Summary" that "Mr. Meese retained the risk of gain or loss in the market value of the RBOC stock during the period between the document's execution and the contemplated sale of the stock by Mr. Chinn" (Report, p. 66). He then qualifies this statement by noting that "[t]he evidence is less clear whether Mr. Meese intended and expected that any appreciation in the stock's value before it was sold would accrue to the Meeses'

benefit" (Report, p. 67). Mr. Meese's testimony is clear, however, that it was his intention that he receive only what he gave -- the value of the stock on May 23, 1985.

Based upon this testimony, another point becomes immediately apparent. Since Mr. Meese believed that Mr. Chinn was entitled to any gain in the value of the stock, how could he possibly have believed that he had a "financial interest" that was being affected by his involvement in the "Baby Bell" matters? Assuming Mr. Meese ever considered the possibility (and the undisputed evidence says that he did not), any future benefit would have accrued to Mr. Chinn, not to Mr. Meese.

- (5) Mr. Meese's willingness to absorb any interim reduction in value was reasonable because he had misplaced the certificates.

Mr. McKay concludes that the Meeses continued to own the transferred "Baby Bell" stocks because Mr. Meese testified that he would not have expected Mr. Chinn to take the risk of interim loss (Report, pp. 67, 384). But that willingness had nothing to do with the ownership of the stock. Mr. Meese recognized that the absence of the stock certificates was not Mr. Chinn's fault; it was the Meeses who could not find their certificates. It would, therefore, have been most unfair to saddle Mr. Chinn with a loss because the Meeses transferred the shares by way of a "Transfer of Property" document rather than with ordinary stock certificates.

- (6) Mr. Meese set aside all dividend checks
because he believed they were not his.

Additional proof that Mr. Meese viewed the "Baby Bell" stock as having been validly transferred was his treatment of dividend checks and stock dividends. When they arrived in the mail, they were all set aside in unopened envelopes to await receipt of the replacement stock certificates. Mr. Meese intended to deliver the dividends to Mr. Chinn together with the new certificates. Dramatic evidence of Mr. Meese's state of mind on this issue is provided by Mrs. Meese's grand jury testimony:

Q. Now, you say you transferred that whole thing over to Frank Chinn. What are you referring to?

A. Well, when the -- because the Baby stock dividends kept coming, and I said, "Hot dog," you know, this is -- I used to get dividend checks that were mine, and Ed said, "You can't touch those. We don't own those. They go to Frank Chinn."

Despite this compelling testimony, Mr. McKay views the receipt of the dividends as proof that the Meeses held beneficial ownership of the stock until September 1987 (Report, pp. 355-356). He recites, in a substantially misleading manner, that "[a]ll dividend checks in that two-year period were held until September 1987, and then deposited into the Meeses' joint money market account at Merrill Lynch" (Report, p. 382). In fact, as Mr. McKay's report later acknowledges, Mr. Meese testified that the checks were preserved in "unopened" envelopes with the anticipation that they would be delivered to Mr. Chinn (Report, p. 387). Only after the partnership with Mr. Chinn was terminated in June 1987 and Mr. Chinn executed a retransfer

document in dissolution of the partnership did the Meeses obtain ownership of the dividend checks. Their conduct in the interim was consistent with their view that the stock did not belong to them.

(7) Mr. Meese's efforts to obtain replacement certificates manifested his understanding that the stocks belonged to Mr. Chinn.

During the months following May 23, 1985, after Attorney General Meese tried to find the misplaced certificates and could not, he finally "undertook to obtain replacement certificates" (Report, pp. 355, 385-386). These acts, which are undisputed, are treated by Mr. McKay as proof that Mr. Meese believed he owned the stock. But in fact they prove the contrary. Mr. Meese was seeking replacement certificates only in order to carry out the obligation undertaken by him in the "Transfer of Property" document -- to "provide to transferee the stock certificates representing the above-listed securities as soon as they are available" (Report, p. 379).

And there is no significance whatever to the fact, on which Mr. McKay relies, that "in October 1986, [the Meeses] declared that they still owned the stock for income tax purposes" (Report, p. 356). Internal Revenue Service rulings require a record title-holder of stock, even if he is no longer the beneficial owner, to report as income any dividends received. See, e.g., Silco, Inc. v. United States, 779 F.2d 282, 285 (5th Cir. 1986); and Treas. Reg. § 1.61-9(c). The Meeses received the

Forms 1099 that showed distribution of dividends to them. Rather than dispute the matter of actual ownership with the Internal Revenue Service, they voluntarily assumed the obligation of paying the tax.

- (8) The retransfer of property was consistent with Mr. Meese's belief that he did not own the stock between 1985 and 1987.

When the partnership with Mr. Chinn was terminated in June 1987, Mr. Meese advised Mr. Chinn in writing that he had been holding the dividend checks, as well as stock dividends, in anticipation of receiving the new certificates (Report, pp. 387-388). He then left it to Mr. Chinn to decide whether or not he wanted to retransfer to the Meeses the interest initially transferred by them on May 23, 1985. Mr. Chinn agreed to the retransfer and signed the document. This series of acts was entirely consistent with Mr. Meese's understanding that, during the entire period, the stock had belonged to Mr. Chinn. Both parties concurred that the Meeses should keep the pile of dividend checks that had accumulated in the interim because Mr. Chinn had not invested the funds represented by the Baby Bell stocks and would have been unjustly enriched if he had retained the dividends paid during that period.

- (9) Mr. Meese did not violate the criminal statute if he merely had "reason to know" that he retained ownership.

Perhaps the largest flaw in Mr. McKay's finding is that he attempts to impose a negligence standard on a criminal law. Section 208(a) requires proof of actual knowledge of a financial interest, not merely proof that would give a person "reason to know" he had a financial interest, or that would put him "on notice" of such a financial interest (Report, p. 355). This is not a civil negligence case. Mr. McKay is stating an opinion on criminal law and its consequences. Mr. McKay says essentially that Mr. Meese should be branded a felon because he should have known that the "Transfer of Property" document did not adequately shift ownership of the stock to Mr. Chinn. That is a gross misstatement of the law. What Mr. Meese "should have known" might be of interest in deciding whether he was negligent in accepting his chief-of-staff's proposed transfer document. It is not relevant in establishing whether his conduct can be declared a "probable" criminal violation.

B. Other Legal Grounds Preclude Any Finding that Section 208(a) Was Violated.

The issue of Mr. Meese's knowledge is only the first -- albeit the most fundamental and compelling -- of several legal reasons why the facts do not justify the conclusion announced by Mr. McKay in his report. The legal memorandum we submitted to Mr. McKay and his staff presented a number of other arguments,

and these are reproduced as Appendix 7 to this Response. Briefly stated, they are as follows:

(1) The law requires proof of a "financial interest" in the "particular matter" in which a government official participates. It is not enough, in other words, to prove that Mr. Meese knew he owned "Baby Bell" stocks between 1985 and 1987. To violate Section 208(a) he must have known that the matter in which he participated would affect that "financial interest." Neither the meeting with Assistant Attorney General Douglas Ginsburg in October 1985 (Report, pp. 66, 409-420), nor Mr. Meese's actions regarding the Dole Bill in May 1986 (Report, pp. 66, 424-426) qualify under this standard. At both times, Mr. Meese anticipated that substitute stock certificates would be available shortly, and that he would not be holding even nominal legal title to the "Baby Bell" stocks by the time the Justice Department's actions could have any effect. The October 1985 meeting related to a report that was to be filed in court 15 months later, while the May 1986 discussions concerned support for legislation that was to be introduced in the future and that could not, even from Mr. McKay's vantage point, have any impact on telecommunications stock before "enactment" (Report, p. 71). At that same time, Mr. Meese was actively engaged in applying for new stock certificates and did not expect his nominal ownership of the "Baby Bell" stock to continue for more than a brief period.

(2) Section 208(a) is violated only if the government official's participation in the action as to which there is a conflict of interest is both "personal" and "substantial." The Office of Government Ethics has issued regulations defining what "substantial participation" means (5 C.F.R. § 737.5(d)):

"Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

Mr. Meese's personal involvement in the matters cited in Mr. McKay's report did not satisfy this standard. Mr. Meese's so-called "approvals" were so routine as to amount to no more than a deferral to Mr. Ginsburg's expertise. If anything, his participation in the two meetings targeted by Mr. McKay was merely a verification of the fact that, in the words of the regulation, Mr. Meese had "official responsibility" for the matters presented to him.

(3) Section 208(a) relates only to involvement in "particular matters." That term does not include, under well-recognized regulations published by the Office of Government Ethics, "broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects." 5 C.F.R. § 737.11(d). Mr. Meese's meeting with Mr. Ginsburg in October 1985, assertedly arranged to "establish . . . a policy and formulation" of the January 1987 report (Report, p. 459), falls squarely within this definition.

The same holds true with respect to Mr. Meese's involvement in the Dole legislation in May 1986. In June 1982, Mr. Meese had been advised by the White House counsel that, in his opinion and in the opinion of the Office of Government Ethics, "discussions and decisions relating to legislative proposals for restructuring the telecommunications industry do not constitute 'particular matters' within the meaning of [Section 208(a)]" (Report, p. 370). Mr. McKay finds that "the implication [of this advice] was that, to the extent Mr. Meese's role related only to legislative matters, a waiver may have been unnecessary" (Report, p. 370). Mr. Meese was fully justified in relying on that opinion, provided to him when he received his first waiver for participation in telecommunications matters, at the time he was asked routinely to approve a legislative proposal in 1986.

(4) The prohibition of Section 208(a) does not apply if a waiver of a conflict-of-interest is obtained because the official's financial interest is too small to affect the integrity of his service. Mr. Meese obtained such a waiver in 1982, permitting him to participate "in decisions necessary to implement . . . policy and strategy recommendations" affecting the telecommunications industry. While Mr. McKay simply declares -- again without citing a single legal authority -- that "[t]he independent counsel has concluded that, as a matter of law, the 1982 waiver was no longer valid" after Mr. Meese left the White House (Report, p. 55, n.13), ethics opinions suggest that that waiver applied, as well, to Mr. Meese's actions as Attorney General, which came within the quoted language. And, in any

event, the same reasoning that resulted in the 1982 waiver and in the waiver issued in January 1987 applied equally to the interim period.

IV

**MR. MEESE COMMITTED NO CRIMINAL
TAX OFFENSE WHEN HE AUTHORIZED
HIS ACCOUNTANT TO FILE HIS 1985
RETURN ON THE BASIS OF AVAILABLE
INFORMATION AND IN ACCORDANCE
WITH THE ACCOUNTANT'S ADVICE**

A squadron of five IRS Agents spent months scrutinizing all of Mr. Meese's personal finances for the past seven years. Mr. Meese voluntarily produced, according to Mr. McKay's report, "income tax records, bank records, investment records, insurance records, property records, credit card records, and gift records" (Report, p. 525). Additional records pertaining to the Meeses were obtained from banks and other financial institutions.

The IRS Agents organized this wealth of information on "a computerized data base" and produced an "unusually complete" form of IRS examination -- a "specific item financial analysis" (Report, p. 525). In this manner, Mr. McKay traced every item of income and expense that the Meeses had incurred over the past seven years. The result of this painstaking and meticulous review was a totally clean bill of health (Report, p. 34):

The financial records of Mr. and Mrs. Meese did not evidence any unexplained income or expenditure, unusual asset, concealed transaction or any other unexplained improvement in their financial condition since 1980.

The exhaustive review did, however, turn up one personal financial matter on which Mr. McKay and his staff disagree with a judgment made by Mr. Meese and his accountant. At issue is the capital gain on the 1985 sale of the Meeses' stock. This sale had been promised, in part, during Mr. Meese's confirmation hearings and it was accomplished in May 1985 with substantial

notice to the entire Justice Department. Because the information regarding the cost of the transferred stock was not available to Mr. Meese when the deadline came for him to file his 1985 tax return, his accountant -- a respected California C.P.A. -- advised him to defer recognizing any gain or loss and file an amended return when he obtained the necessary information. With Mr. Meese's concurrence, the accountant filled out the tax return and filed it precisely as he had advised.

In order to avoid completing his 14-month fishing expedition with an empty net, Mr. McKay now declares that this omission -- plainly done in good faith -- violated two criminal tax laws. Mr. McKay's conclusion is so far beyond the scope of reasonable argument that it would be laughable if it did not have potentially serious consequences for Mr. Meese's reputation and professional standing.

We note again that Mr. McKay's assertion that there was a "probable" violation of the criminal laws is beyond his jurisdiction. An independent counsel is not authorized to issue proclamations that brand the subject of his investigation as a felon. He has stated ample reasons for not prosecuting Mr. Meese on these purported tax offenses, and each of the reasons establishes, as well, that there was no willfulness and therefore no violation of the tax laws:

(1) Mr. McKay's "careful review" of Mr. Meese's 1981-1986 tax returns established that during the entire period Mr. Meese appeared "in all other respects to have complied with his tax obligations" (Report, p. 96).

(2) Mr. McKay found that "[t]he evidence shows that, at the time he filed his October 15, 1986 tax return, and thereafter, Mr. Meese intended at some future time to file an amended return and to pay the tax due" (Report, p. 96).

(3) Before Mr. McKay's investigation began, "steps to gather the information needed to file" the amended tax return had already been taken by Mr. Meese (Report, p. 97).

(4) Mr. Meese "relied on a professional accountant" to whom he disclosed all the relevant facts and whose suggestion he followed (Report, p. 97).

(5) Mr. McKay believes that this might be found by the IRS to be an appropriate case for the application of a civil penalty because it was a "one-time failure to comply in full" with a tax obligation (Report, p. 98-99).

These reasons for not initiating a prosecution were all that Mr. McKay had to say to satisfy his legal mandate. Instead, Mr. McKay has gone out of his way to declare Mr. Meese's conduct criminal under an idiosyncratic view of the meaning of Sections 7203 and 7206 of the Internal Revenue Code that would be shared by very few, if any, authorities on tax or criminal law. This view should not have been dignified with the imprimatur of inclusion in a report of an independent counsel.

To establish how far Mr. McKay has strayed beyond reasonable bounds, we presented the facts of this case to one of the country's most experienced criminal tax prosecutors. Cono R. Namorato is a partner at the law firm of Caplin & Drysdale, that specializes in tax law. During the Ford and Carter Administrations, he served as Deputy Assistant Attorney General of the Justice Department's Tax Division (1977-1978) and as Chief

of the Criminal Section of the Tax Division (1975-1977). He is an acknowledged expert on the criminal tax laws and has vast experience in reviewing the prosecution of criminal tax cases. Mr. Namorato concluded, in a letter opinion that is attached as Appendix 2, that the proof that Mr. McKay calls a "probable" violation of Sections 7203 and 7206 of the Internal Revenue Code would be dismissed as totally insufficient at the end of the prosecution's case. He says that the conclusion that there was no willful violation of the tax laws is "not even a close case." Mr. McKay's contrary view -- based on far less experience than Mr. Namorato has with the tax law and the criminal law -- is entitled to no weight whatever.

A. Mr. Meese Attempted in Good Faith To File an Accurate Tax Return by the Filing Deadline.

Even Mr. McKay does not assert that Mr. Meese was seeking, at any time, to avoid payment of the tax due on the sale of his family's stock. Mr. McKay acknowledges (Report, p. 96):

The evidence shows that, at the time he filed his October 15, 1986 tax return, and thereafter, Mr. Meese intended at some future time to file an amended return and to pay the tax due.

The only basis for Mr. McKay's conclusion that a crime had been committed is his view that the information ultimately reported on the amended tax return should have been included on the return as it was initially filed, and the additional tax calculated and paid. But Mr. McKay ignores the undisputed evidence that the necessary information was not physically

available at that earlier time. Contrary to the testimony of Mr. and Mrs. Meese and to the testimony of the Meeses' accountant, he declares, with no support in the evidence, that "[a]t all relevant times Mr. Meese had possession of, or could have obtained, the information needed to determine the proceeds and to establish the cost or other basis of the securities sold" (Report, p. 78). This statement is demonstrably false. The facts recited in Mr. McKay's own report reveal that Mr. Meese made every effort, in good faith, to file a complete tax return by the October 15 deadline.

(1) The pattern of prior years was followed in 1986.

The steps Mr. Meese took to prepare the Meeses' 1985 tax return were identical to the procedure that had enabled Mr. Meese to file complete and accurate returns in every prior year. Mr. McKay found that over the 1981 to 1986 period, Mr. Meese appeared "in all other respects to have complied with his tax obligations" (Report, p. 96). As in prior years, Mr. Meese, in 1986, retained John R. McKean, a certified public accountant, to prepare his income-tax returns. Because of the heavy time commitments of his public offices, Mr. Meese regularly deferred completion and filing of his tax returns until the last date for which extensions may be secured -- October 15. ^{*}/ In accordance with his

^{*}/ Mr. McKay's demeaning assertion that Mr. Meese was "abusing the extension process" (Report, p. 87) because he customarily gave "higher priority" to "other concerns" -- presumably the public obligations of the Counselor to the President and of the (Cont'd)

regular routine, shortly before that date in 1986, Mr. Meese gathered the necessary information for preparation of his tax return. In no prior year had this approach caused any problem for timely submission of a fully accurate return.

(2) Their habit of obtaining extensions usually worked to the Meeses' detriment.

Mr. McKay criticizes Mr. Meese's "procrastination" -- as if this were the essence of the crimes defined in the Internal Revenue Code (Report, p. 87). In most years, however, the delay had hurt only the Meeses. Their computed tax returns, as the report reveals, showed that they were entitled to refunds for 3 of the 4 years preceding 1985 (Report, p. 471 n. 183).

(3) The Meeses were not stock traders.

Mr. McKay found, "In years prior to 1985 the Meeses generally had not engaged in substantial securities sales" (Report, p. 463). The Meeses were not active, or even periodic, stock traders. Indeed, between 1982 and 1986, the only other capital transaction they personally engaged in, apart from the sale of their California residence, was a single trade of stock in 1983. Thus, their routine did not involve the maintenance of stock and bond records. The stocks sold in 1985 as a result of Mr. Meese's commitment to Congress had largely been held since they were inherited by Mrs. Meese some eleven years previously.

Attorney General -- is a revealing insight into the pettiness and bias that pervade this portion of his report.

The rest had been purchased for Mrs. Meese by her father decades earlier. When Mr. Meese turned, in October, to gathering material for the 1985 return, he found that he would have to locate cost basis information for securities transactions that had occurred many years earlier. After searching his and his wife's records in early October, he was unable to locate this information.

(4) All other available data needed for the tax return was provided.

Mr. Meese was able to gather the vast bulk of the information necessary to file the 1985 tax return, as had always been the case in the past. Since he had scheduled a trip to Mexico for October 8-10, 1986, followed by stops in San Diego on October 11-12, 1986, and Northern California on October 13, 1986, he decided to take the information that he had gathered in early October with him, and to have it delivered to his accountant, Mr. McKean, on Monday, October 13. The tax information gathered by Mr. Meese and delivered to Mr. McKean enabled the accountant to file a return on the Meeses' behalf that -- to quote Mr. McKay -- "included all other required information" (Report, p. 81).

(5) Mr. Meese fully disclosed the facts to his accountant.

At some point prior to the week of October 13, Mr. Meese called Mr. McKean and told him of his plans. He stated that he had gathered most of the information necessary for the tax

return. He added that he and his wife had sold securities that Mrs. Meese had received from her family, but that he did not have the cost basis information necessary to report those transactions. The two men "then discussed how to proceed in the circumstances" (Report, p. 466). Mr. McKean noted that the basis for the stocks that Mrs. Meese had inherited would be determined by their value at the time of the inheritance (the "stepped-up basis"), and that Mr. Meese should therefore obtain that information from the attorney for his mother-in-law's estate.

(6) The accountant advised Mr. Meese to
proceed as he did.

Mr. Meese asked Mr. McKean how to proceed, and Mr. McKean advised him that he would prepare as complete a return as possible with the other information (salary, dividend income, interest deductions, and the like) that Mr. Meese was able to gather by October 15. Mr. Meese was told to continue his search for the necessary information relating to the securities transactions, and he was advised that when that information was located an amended return could be filed. Mr. McKay's report concludes that Mr. McKean "suggested to Mr. Meese, and Mr. Meese agreed, that if the necessary data were not obtained by the filing deadline of October 15, the return be filed without reference to these transactions and that an amended return be filed 'as soon as possible'" (Report, p. 468). During this conversation, Mr. McKean either "stated or implied to Mr. Meese that this course of action was appropriate and responsible under

the circumstances" (Report, p. 79). Mr. McKean did not suggest alternative approaches to filling out the 1985 return.

(7) Mr. Meese tried again to secure data before October 15.

Even as the filing deadline approached, Mr. Meese continued his efforts to locate the missing information. While on an official business trip to Mexico, he directed his office to contact the attorney for his mother-in-law's estate, Richard H. Rahl of San Francisco, to obtain cost basis information for those stocks that Mrs. Meese had inherited through her mother's estate. Mr. Rahl mailed the information late on Friday night, October 10, to Mr. Meese at the Meeses' Virginia home. Mr. Meese did not receive the information, however, until his return home, when it was too late for inclusion in the tax return prepared by Mr. McKean. */

*/ Mr. McKay concludes benightedly that, between October 7 and 15, Mr. Meese had "a last opportunity to gather the required information, which he might have done if he had given a higher priority to the importance of his tax obligations" (Report, p. 88). Mr. Meese was embarking on official business to Mexico, and from there to the West Coast. He was not to return to his Virginia home until at least October 14. Perhaps Mr. McKay, if he were Attorney General, would have cancelled an official trip to Mexico to do a second search of his records for tax information he already previously failed to find (and which ultimately took months to retrieve). Most other government officials would disagree with Mr. McKay's "priorities." But even if that were a correct ordering of priorities, acting as Mr. Meese did -- i.e., placing official government duties ahead of personal legal obligations -- is not criminal.

- (8) The accountant completed the Meeses' blank signed return and made a note in his workpapers.

Mr. Meese provided the other information needed for his tax return to Mr. McKean on October 13, together with a blank return signed by himself and Mrs. Meese. Mr. McKean filled out the return pursuant to his earlier advice (omitting any reference to the stock sales) and sent it to the Internal Revenue Service. A member of his staff entered the following notation in the office's workpapers (Report, pp. 28, 468, 470):

Stocks and bonds were sold during 1985 but the information was unavailable for processing the 1985 Tax Return. When the information becomes available, we will file amended tax returns. We are assuming no gain or loss on the sales at this time.

B. Mr. Meese Took Active Steps To Collect the Needed Information for an Amended Return.

Mr. McKay's assertion that Mr. Meese was dilatory in providing information for the amended tax return is demonstrably false. His statement that Mr. Meese did not provide information "until . . . more than one year later despite repeated efforts by his accountant to obtain that information from him" (Report, p. 29) is belied by his own detailed description of the steps Mr. Meese took to provide Mr. McKean with additional information.

Once the initial return was filed, Mr. Meese continued his efforts to provide the information to Mr. McKean to prepare an amended return. Mr. McKay acknowledges that Mr. Meese's "steps to gather the information needed to complete his amended

return" were already under way when Mr. McKay's investigation began (Report, p. 97). Mr. McKay details one meeting on the subject in Washington in December 1986 (Report, pp. 472-473), after which Mr. Meese provided Mr. McKean a two-page list of securities including information from his mother-in-law's probate proceedings (id.). Mr. McKean's office then compiled a list of questions which were discussed in January 1987 during another meeting between Mr. McKean and Mr. Meese. Later in the month, Mr. Meese's responses to the questions were received by Mr. McKean's office (Report, p. 474).

At the same time, Mr. Meese provided to Mr. McKean the brokerage records relating to the stocks that had been sold, as well as the valuation information he received from the attorney for his mother-in-law's estate. Mr. McKean's office then identified the securities that had not been obtained through the estate, and in February 1987 a list of those securities was prepared. Mr. McKean gave the list to Mr. Meese in late February or early March 1987, and Mr. Meese undertook to provide the cost basis information concerning those securities (Report, p. 475).

These exchanges in late 1986 and early 1987 demonstrate that Mr. McKay is clearly wrong in his statement that Mr. Meese "had possession of or could have obtained" the necessary information (Report, p. 78) and was therefore to blame for delay in filing the amended return.

In the course of an exhaustive search in response to a document request in this investigation, Mr. Meese discovered an old stock ledger prepared by Mrs. Meese's father and a

"Securities and Income Record" which provided, for the first time, useful information for discovering the cost basis of the non-inherited securities. This information, together with additional research required to be conducted by Mr. McKean's office, provided most of the remaining cost basis information. The amended return was filed in early February 1988, together with additional tax due and an interest payment calculated by Mr. McKean. In early April 1988, the local Internal Revenue Service accepted the amendments with only a minor assessment of additional interest in the amount of \$38.32, and without the imposition of any civil penalties.

C. There Is No Basis Whatever For Concluding that Mr. Meese Acted Willfully and With Specific Intent To Violate the Law.

Mr. McKay correctly recites the legal standard that the Supreme Court has established for determining whether a "willful" tax violation has occurred: There must be proof of a "voluntary, intentional violation of a known legal duty" (Report, pp. 85, 92; United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 359-360 (1973)). He also acknowledges that the burden is on the prosecutor to provide the evidence to justify his accusations of criminal conduct, whether this is established by "direct evidence" or by other "facts and circumstances" (Report, p. 85, citing Holland v. United States, 348 U.S. 121 (1954)). Mr. McKay errs, however, in believing that he has presented any evidence of "willfulness" that a court would

find competent to establish that a tax crime has been committed here.

(1) Awareness that an incomplete return is filed is not willfulness.

The only evidence Mr. McKay presents to support his proposition that criminal tax offenses were "probably" committed is the fact that Mr. Meese knew that the return, as filed, did not report the stock sales and "must have known" that he had a net gain on the sales (Report, p. 86, 92). Mr. Meese "knew" that the information was not on the return for the obvious reason that he had tried to get that information in time and could not do so. The question, however, is not whether Mr. Meese was aware of the contents of his tax return but whether he voluntarily and intentionally violated the tax laws. The Supreme Court has held that willfulness "must be proven by independent evidence and . . . cannot be inferred from the mere understatement of income." Holland v. United States, 348 U.S. 121, 139 (1954); United States v. Voorheis, 658 F.2d 710, 715 (9th Cir. 1981). Obviously, a taxpayer's mere consciousness of his own dilemma does not turn innocent conduct into criminal behavior.

(2) None of the accepted evidence of willfulness is present here.

Courts have frequently enumerated the kinds of evidence that proves the willfulness required for a criminal violation of the tax laws. Particularly when the allegation rests on a single

episode -- the omission of one item from a single tax return -- rather than on a pattern of conduct, it is essential that several of these indicia of criminal intent be present. The Supreme Court's articulation is as follows:

By way of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal.

Spies v. United States, 317 U.S. 492, 499 (1943). See also, e.g., Holland v. United States, 348 U.S. at 139 (evidence of a "consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records").

The Department of Justice Manual, allegedly a "principal source" for the standards Mr. McKay applies (Report, p. 50), provides prosecutors in the Tax Division with more than four pages of examples of the type of evidence required to show that a tax violation has been "willful" -- not a single one of which appears anywhere in Mr. McKay's account. Department of Justice Manual § 8.06[3] at pp. 6-256 to 6-259. The Manual points to such conduct as a "consistent pattern of under-reporting large amounts of income," a practice of "concealing cash receipts" or other information from the taxpayer's accountant, making false statements to IRS agents, keeping a "double set of books," destroying, throwing away or "losing" records, using false

documents and invoices, placing property or business in another's name, extensive use of cash and cashier's checks, bank accounts held under fictitious names, "unorthodox accounting practices with deceptive results," prior and subsequent similar acts in nearby years, offers to bribe agents or witnesses, and backdating documents or receipts to gain a tax advantage. The Manual makes clear that these are the guidelines federal prosecutors should use in determining whether "willfulness" exists in cases under Sections 7203 and 7206(1). See Department of Justice Manual §§ 10.05[4] at pp. 6-279 to 6-280; 12.09 at pp. 6-320 to 6-321.

There is not a shred of evidence to suggest that any of the types of conduct described above has occurred, or that Mr. Meese did anything "the likely effect of which would be to mislead or to conceal." Spies v. United States, 317 U.S. at 499. To the contrary, it is Mr. McKay's conclusion, for every one of the six years Mr. McKay pored over, that Mr. Meese "appears in all other respects to have complied with his tax obligations" (Report, p. 96).

Faced with a total lack of the kind of evidence of "willfulness" which the Department of Justice Manual outlines as a potential basis for criminal prosecution, Mr. McKay does not even pause to ask whether he has a case. Nor does he even confront the most fundamental question: Has a taxpayer "willfully" violated the tax laws when, despite his efforts to obtain necessary tax information, he finds that it is impossible for him by the tax deadline to report and ascertain the taxes for an unaccustomed item of income on his tax return? Is such a

taxpayer guilty of a tax crime when he is unable to complete one item on his tax return, even though he has followed the same routine that previously resulted in the filing of timely and accurate returns?

(3) Procrastination is not willfulness.

Mr. McKay's condemnation of Mr. Meese is based largely on his view that it was Mr. Meese's "habit of procrastination in such matters and the higher priority he gave to other concerns" (Report, pp. 86-87, 94 n.38) that placed him in the position where he could not find the required records in time for the filing of the return. Even granting Mr. McKay's derogatory premise and his confused priorities, the fact that the unavailability of a taxpayer's records may be partly attributable to the taxpayer's own inadvertent conduct does not make him a criminal.

A criminal tax prosecution must be based on "more than a showing of careless disregard" or negligence. United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 359-60 (1973); United States v. Claiborne, 765 F.2d 784, 797 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); United States v. Eilertson, 707 F.2d 108, 109-10 (4th Cir. 1983). Mr. McKay has produced no evidence whatever to contradict Mr. Meese's sworn statements that he "had absolutely no intention to violate any provision of the income tax laws or to avoid or delay the payment of any tax liability." And contrary to Mr. McKay's views, it simply is not true that a taxpayer becomes a

criminal solely because of his delay and his knowledge that his return is incomplete.

(4) Mr. Meese followed his accountant's advice.

Faced with a situation in which he did not have the data necessary to compute the gains or losses on the disposition of the family-held securities, Mr. Meese turned for guidance to the individual who prepared his returns for the preceding three years. He was told that it would be permissible to file a return without reference to the securities transactions and to file an amended return at a later date.

Mr. McKay acknowledges that "Mr. McKean stated or implied to Mr. Meese in their October 1986 telephone conversation that, in the situation in which Mr. Meese found himself, filing the return without reference to the securities sales, with the intention to file an amended return later, was an appropriate and responsible course of action in the circumstances" (Report, p. 88). Mr. McKay concedes, as he must, that good-faith reliance on an accountant's advice negates the willfulness necessary for a criminal tax violation. United States v. Solomon, 825 F.2d 1292 (8th Cir. 1987), cert. denied, 108 S. Ct. 782 (1988); United States v. Fitzsimmons, 712 F.2d 1196 (7th Cir. 1983); United States v. Head, 641 F.2d 174, 180 (4th Cir. 1981), cert. denied, 462 U.S. 1132 (1983); Bursten v. United States, 395 F.2d 976, 981 (5th Cir. 1968), cert. denied, 409 U.S. 843 (1972); United States v. Platt, 435 F.2d 789, 792 (2d Cir. 1970); United States v.

Pechenik, 236 F.2d 844, 847 (3rd Cir. 1956). That rule, in and of itself, would preclude a criminal prosecution on these facts.

Mr. McKay rejects that principle here because, without ever asking Mr. Meese, he concludes that Mr. Meese "obviously" knew that this was "incorrect advice" (Report, pp. 89-90). He bases this assertion on the observation that "Mr. Meese is a lawyer and a taxpayer of many years' experience" and that he would therefore know "that a taxpayer does not have the right to grant himself an extension of time, beyond the maximum extensions permitted by law, whenever the taxpayer believes he has a good reason" (Report, p. 90). To equate the solution proposed by Mr. McKean -- and deemed by him to this day to be a reasonable means of dealing with the problem of unavailable records -- as equivalent to a taxpayer "granting himself an extension of time" is disingenuous, to say the least.

It is evident that Mr. Meese relied in good faith on his accountant. Indeed, he effectively assigned to the accountant the "last opportunity" to determine how best to deal with the problem by giving him a signed blank tax return. Not only is there no evidentiary basis to infer that Mr. Meese distrusted the accountant's advice; all the evidence demonstrates that he followed it precisely.

Mr. McKay offers a second response to the compelling evidence regarding Mr. Meese's reliance on Mr. McKean's recommendation. What Mr. McKean told Mr. Meese is described by Mr. McKay as not being "a professional 'opinion' concerning the legal sufficiency of the proposed course of action" but only "a prag-

matic solution to a problem" (Report, p. 469). Mr. McKean's distinction between an "opinion" and a "solution" is sheer pettifoggery. Mr. Meese presented his accountant with the situation, told him all the relevant facts, and requested his advice. Did the advice have to appear on a form captioned "Accountant's Opinion" for Mr. Meese to be entitled to rely and act upon it?

Finally, there is Mr. McKay's stunning concession that had Mr. McKean suggested "that the return include a good faith estimate of the tax due on the securities sales, coupled with a statement that Mr. Meese intended to file an amended return to provide the missing information," and had Mr. Meese followed that suggestion, "the elements of Mr. Meese's two probable criminal violations would not exist" (Report, p. 98). In other words, had Mr. McKean suggested an alternative course of action, or proceeded to file the Meeses' return as Mr. McKay now suggests it should have been filed -- as Mr. McKean would have had power to do -- Mr. McKay would not now be accusing Mr. Meese of "probable" criminal violations.

If so, it is plain that Mr. McKay is now charging Mr. Meese with criminal conduct for the sole reason that his accountant gave him the wrong advice. Mr. McKay concedes that Mr. McKean proposed only the course ultimately taken. Mr. McKay does not doubt that Mr. Meese would have followed some other advice, had it been given. Yet his report holds Mr. Meese criminally responsible for the adequacy of his accountant's advice.

V

**THE REPORT EXONERATES
MR. MEESE OF ANY IMPROPRIETY IN
CONNECTION WITH MRS. MEESE'S EMPLOYMENT
WITH THE MULTIPLE SCLEROSIS SOCIETY**

One of the many regrettable results of this extended investigation is that it intruded upon Mrs. Meese's personal and professional life by subjecting to public scrutiny her entirely proper and legitimate employment with a respected charitable organization, the Multiple Sclerosis Society. Mr. McKay correctly notes that Mrs. Meese had been "an active and productive volunteer" with the Society "since 1981" (Report, p. 29).

This aspect of the investigation did not arise until February 1988, three months after Mr. McKay had concluded his investigation of the charges originally referred to him (Report, p. 11). Like many others, it was "leaked" to the press, subjecting Mrs. Meese and the Multiple Sclerosis Society to wholly unjustified obloquy. It soon became apparent, however, that this avenue of inquiry, like the others, was unproductive.

The investigation focused on whether a lease renewal at the Chester Arthur Building in Washington, D.C., by the General Services Administration and the Department of Justice was related to a contribution made by the Bender Foundation to the Multiple Sclerosis Society for the purpose of funding Mrs. Meese's employment. This allegation was based entirely on the fact that Howard Bender, the principal benefactor of the Bender Foundation, also had an ownership interest in the Chester Arthur Building.

Mrs. Meese's efforts on behalf of the Multiple Sclerosis Society were not only legitimate and bona fide, as Mr. McKay acknowledges, but they had been uniformly praised by the Society's Board of Directors and its Executive Director (Report, p. 492). She has been instrumental in expanding a highly successful employment program for the handicapped during the three years of her tenure with that organization. There is no suggestion, nor could there be, that Mrs. Meese has not earned her salary. To the contrary, the Multiple Sclerosis Society felt without qualification that her services were worth far more than the \$40,000 per annum that she was paid. As for the "generosity of the Bender Foundation" in making a charitable contribution to fund the position, Mr. McKay finds no evidence to suggest that Mr. Meese believed that this "was motivated by any anticipated official action by Mr. Meese to benefit either Mr. Wallach or the Bender real estate interests" (Report, p. 112).

With respect to the renewal of the lease on the Chester Arthur Building, Mr. McKay similarly found "no evidence that Mr. Jenkins or any other representative of Mr. Bender had any contacts with Mr. Meese or the Office of the Attorney General" (Report, pp. 33, 503), "no evidence that Mr. Meese or the Office of the Attorney General was in any way involved in the lease renewal" (Report, pp. 33, 482, 504), and no evidence that Mr. Meese "performed any official action that benefited Mr. Bender" (Report, pp. 33, 507). Moreover, while Mr. McKay gratuitously adds that Mr. Bender or Mr. Wallach may have had "ulterior

motives," he expressly finds "no evidence that Mr. Meese was aware of" any such motives (Report, pp. 33, 507).

Since there was no evidence of involvement or knowledge by Mr. Meese in the Chester Arthur Building lease, there could not possibly be grounds for suggesting impropriety, much less illegality, on Mr. and Mrs. Meese's part. The simple fact is that Mr. Meese never knew that Mr. Bender had any ownership interest in the Chester Arthur Building, and Mr. McKay so finds (Report, pp. 33, 506-07).

VI

**THE REPORT EXONERATES MR. MEESE
OF RECEIVING BENEFITS FROM
MR. WALLACH IN RETURN FOR
PERFORMANCE OF OFFICIAL DUTIES**

As Mr. McKay's investigation progressed, reports began to appear in press accounts critical of the overall relationship between Mr. Meese and Mr. Wallach. In April 1988, the press reported that Arnold Burns and William Weld had informed President Reagan that, in their view, Mr. Meese and Mr. Wallach could be indicted for violation of the criminal statutes relating to gratuities. Here again, Mr. McKay explicitly exonerates Mr. Meese with respect to any such charge.

**A. Mr. McKay Finds No Evidence That Mr. Meese
Improperly Accepted Any Favors or Gifts From Mr. Wallach.**

Mr. McKay's report proceeds through each official act of Mr. Meese that was subject to his inquiry, as well as each "thing of value" that Mr. Wallach -- a long-time personal and family friend of the Meeses -- provided to Mr. or Mrs. Meese. It is plain on the face of this discussion (Report, pp. 104-113, 523-560) that the "things of value" that Mr. Wallach provided to Mr. and Mrs. Meese were no more than one would expect a lifelong family friend to provide in the context of a "longstanding friendship" (Report, p. 36). Mr. McKay expressly finds that there is neither anything "inherent in any of the things of value" nor in the "circumstances of Mr. Meese's acceptance of them" that could give rise to a violation of law (Report, p. 106). It would be astonishing if Mr. McKay had come to any other

conclusion, given his description of the items Mr. Meese received: referrals to lending institutions that resulted in residential mortgage loans at "conventional terms" (Report, pp. 35, 108, 112); preparation for Mr. Meese's confirmation hearings as a "courtesy for a presidential nominee" (Report, p. 108); acceptance of a partial court-awarded fee that would have been found adequate by "a lawyer having arms-length dealings with Mr. Meese" (Report, p. 106); and introduction to an "able money manager" to assist with investing the Meeses' limited assets (Report, p. 111, n. 46), among other similar items.

Mr. McKay's report concludes that "the available evidence is insufficient to conclude that [a gratuities] violation probably occurred" (Report, p. 113). In the body of Mr. McKay's report, the conclusion is much stronger. Mr. McKay details a lengthy and substantial investigation into the financial records of Mr. Meese and Mr. Wallach over a seven-year period of time. Mr. McKay quotes Mr. Meese's testimony to the effect that Mr. Wallach had never given him "any indication that he had any other expectation [beyond personal friendship] in connection with his being solicitous and concerned" for Mr. and Mrs. Meese (Report, p. 559). Mr. McKay then concludes, without equivocation, that Mr. Meese's testimony "is not contradicted by any other direct evidence on this point." He states, "No other witness or document provided evidence that Mr. Meese at any time entertained a different belief about Mr. Wallach's motivations" (Report, p. 560). No other conclusion is possible.

B. Mr. McKay Errs in Suggesting That Mr. Meese Should Have Been More "Sensitive" to Motives for Mr. Wallach's Actions in 1985.

After describing in great detail the relationship between Mr. Meese and Mr. Wallach, including every lunch Mr. Meese and Mr. Wallach shared (and who picked up the bill) (Report, p. 550), Mr. McKay selects three "things of value" and asserts that the timing of these favors and Mr. Meese's official actions was a "notable coincidence" (Report, p. 106). He then makes the assertion, itself laden with qualifications, that the circumstances provide "some evidence" to support a conclusion that Mr. Meese "should have been sensitive to the possibility that a part of Mr. Wallach's motivation may have been to show appreciation for Mr. Meese's official activities" (Report, p. 113).

This gratuitous statement, and the "coincidence" itself, are a figment of Mr. McKay's fancy. Mr. Meese and Mr. Wallach had been friends since they met in law school in 1956. They had raised their families together, and over the years "developed and maintained a close personal relationship" (Report, p. 133). They socialized on "numerous occasions" (Report, p. 106), and communicated regularly on many personal topics. After a close personal friendship of more than twenty years, Mr. Meese is now told that he should have questioned the possible motivations for Mr. Wallach's continuing acts of friendship. That admonition is contrary to human experience. The kinds of favors that Mr. Wallach did -- assisting his long-time friend with a legal

problem, suggesting an investment adviser, and facilitating job opportunities for a family member -- are consistent with ordinary close friendship.

Does Mr. McKay seriously believe Mr. Meese's telephone call to Mr. McFarlane induced Mr. Wallach to yield \$70,000 in legal fees after he had received \$75,000 from the court? In fact, Mr. Garment, for whom Mr. Meese made no call, did the same thing. Why should Mr. Meese be more "sensitive" about Mr. Wallach's action than Mr. Garment's? And does Mr. McKay really believe that Mr. Wallach would not have recommended Mr. Chinn to his friend if Mr. Meese had not been willing to make such a telephone call? Would any reasonable person expect Mr. Wallach, who had developed a close friendship with Ursula Meese over the years, to ignore the fact that she was looking for employment in 1985 and not speak with acquaintances about her recognized professional talents and abilities?

Mr. McKay's conclusion is correct: There is no evidence of illegality in the relationship. It would have been more honest had he recognized the obvious -- that Mr. Meese, with the greatest of sensitivity, had every reason to believe that Mr. Wallach did the things he did because he was one of Mr. Meese's oldest friends, not because he was providing compensation for any official acts.

VII

**THE AQABA PIPELINE INVESTIGATION
PRODUCED NO EVIDENCE OR SUGGESTION
THAT ANY CRIME OR IMPROPER ACT WAS
COMMITTED BY ANYONE**

Never in the history of law enforcement can there have been a criminal investigation as totally unproductive as Mr. McKay's "all-out investigation of the Aqaba pipeline matter" (Report, p. 7). By the end of the investigation, the total evidence in Mr. McKay's possession that any crime whatever had been committed was precisely the same as when the investigation began -- ten ambiguous words in a single memorandum.

**A. The Investigation Was Ill-Advised at Its Inception
and Improvident in Its Execution.**

The inquiry was started because Mr. McKay found ten words in a memorandum written by Bob Wallach -- the ten words underlined in the following quotation:

He confirmed the arrangement with Peres to the effect that Israel will receive somewhere between \$65-\$70 million a year for the ten years out of the conclusion of the project. What was also indicated to me, and which would be denied everywhere, is that a portion of those funds will go directly to labor.

On the basis of this phrase, Mr. McKay initiated an investigation that ultimately cost the taxpayers hundreds of thousands of dollars, required the declassification and examination of thousands of documents marked "Top Secret," compelled Mr. McKay's investigators and lawyers to engage in foreign travel, called into question the integrity of the one-time head of state (and presently Foreign Minister) of a very close ally of the United States, and subjected the Attorney

General to prolonged media criticism. What more evidence that any crime or unethical act had been committed did Mr. McKay have when his massive "all-out" investigation was concluded than he had when it began? Absolutely none.

Mr. McKay's report covers up the blunder of initiating and continuing this investigation with legalistic conclusions that imply there was reason to believe that someone had done something wrong. The "Summary of Facts and Conclusions" recites (Report, p. 49):

There is no direct evidence, apart from Mr. Wallach's September 25, 1985 memoranda, that a bribe was or would be offered to any official of the Israeli Labor Party.

The fourth word of the sentence -- the word "direct" -- implies to the reader that there is some evidence, possibly indirect or circumstantial, that there was or would be a bribe offer. In fact, hidden in the body of the report is the following acknowledgment (Report, p. 577; emphasis added):

The independent counsel has been unable to obtain any evidence, apart from Mr. Wallach's memoranda of September 25, 1985 to Mr. Meese, of the existence of a promise to pay something of value to a foreign political party in violation of the Foreign Corrupt Practices Act. Accordingly, there is insufficient evidence to conclude that the FCPA was violated by Mr. Meese or by anyone else.

It would have been more honest for Mr. McKay to say that "there is absolutely no evidence to conclude that the FCPA was violated by Mr. Meese or by anyone else" than to say only that there was "insufficient evidence." But the public deception on this score continues throughout the report.

In his "Legal Analysis" section, Mr. McKay notes
(Report, p. 126; emphasis added):

Mr. Wallach's memoranda of September 25, 1985, by themselves, do not constitute admissible evidence in a court of law. Apart from those memoranda, the independent counsel has discovered no credible admissible evidence that either component of a foreign bribe existed. No credible admissible evidence has come to light that a payment was actually authorized, offered, or promised to the Israeli Labor Party in connection with the Aqaba pipeline project, and no credible admissible evidence has come to light that such a payment was corruptly intended as the quid pro quo for an official act.

The words "credible" and "admissible" are designed to have the reader infer that there is evidence, albeit less than credible and possibly inadmissible in a court of law. In fact, apart from the Wallach memoranda, there is no evidence, credible or incredible, admissible or inadmissible, that any crime was committed.

This was foreseeable when the investigation began. The possibility that a crime under American law had in fact been committed was slight to begin with. After a few preliminary inquiries, an experienced and responsible prosecutor would have known that the evidence was nonexistent. Mr. McKay, nonetheless, persisted for eight months in pursuing this fire-breathing dragon.

B. Mr. McKay Repeatedly Mischaracterizes the Aqaba Pipeline Project So As To Cast Doubt on the Legitimacy of Mr. Meese's Participation.

In his "Summary of Facts and Conclusions" Mr. McKay deliberately reduces the Aqaba pipeline project to the status of a minor "commercial interest." He says (Report, p. 40; emphasis added):

In late May or early June, 1985, Mr. Meese, knowing that Mr. Wallach was retained by Mr. Rappaport to assist him in connection with an overseas commercial enterprise, contacted National Security Advisor Robert C. McFarlane and requested that he meet with Mr. Wallach about the pipeline matter.

* * * *

It was highly unusual for a Cabinet officer to request Mr. McFarlane to meet with the Cabinet officer's friend about a matter of commercial interest to the friend.

This mischaracterization is repeated throughout the report. Mr. McKay says that Mr. Meese learned from Mr. Wallach "that Mr. Rappaport was promoting a proposed pipeline construction project for a commercial purpose" (Report, p. 648). The conversation is also described as follows (Report, p. 564; emphasis added and footnote omitted):

Within hours of Mr. Rappaport's first meeting with and retention of Mr. Wallach for the purpose described above, Mr. Wallach contacted Mr. Meese, informed him of his new client and sought his assistance in connection with Mr. Rappaport's commercial project.

Was the Aqaba Pipeline Project simply "an overseas commercial enterprise" and merely a "matter of commercial interest"? From Mr. McKay's characterization one might think

that Mr. Rappaport was seeking to open a McDonald's franchise in downtown Baghdad. Plainly, the Aqaba Pipeline Project was not viewed by anyone as simply "an overseas commercial enterprise" or a "commercial project." It involved broad governmental and foreign policy interests. Participants were the governments of Iraq, Jordan and Israel. The project was of significant governmental concern to the United States.

As the report makes clear, Mr. Meese called Mr. McFarlane not to help a friend's "commercial enterprise" but because it appeared to him "that this was something that would be helpful in terms of Middle East peace because it would bring together Israel and Jordan and Iraq" (Report, p. 657). This is how it had appeared to officials of the State Department and the National Security Council during the 26 months that the project was being developed before Mr. Wallach was retained.

Indeed, Mr. McKay's report contains voluminous information demonstrating the high level of American interest in the Aqaba Pipeline Project from its inception. In 1983, says the Report (p. 581), the State Department expressed its view that such a pipeline would "enhance western energy security and price stability," reduce Jordan's "financial burden on its Arab and U.S. benefactors," and "bolster . . . political ties" among the Mideast countries participating in the project. What Mr. McKay calls merely a "commercial project" was discussed between King Hussein of Jordan and President Hussein of Iraq in December 1983, and the United States Department of State actively participated in discussions that followed that meeting (Report, pp. 582-

583). The United States' governmental concern over this "over-seas commercial enterprise" was sufficient to warrant a high-level governmental delegation's trip to Iraq in January 1984 -- a full 16 months before the telephone call from Mr. Meese to Mr. McFarlane that, according to Mr. McKay, "spurred the National Security Advisor's interest in the Aqaba pipeline project" (Report, p. 676).

Mr. McKay's detailed account of the various phases of the Aqaba pipeline project proves that it had the attention of Deputy Secretary of State Whitehead and Assistant Secretary of State Murphy in June 1984 (Report, p. 589), and that in August 1984 it was described in a memorandum to the Deputy Secretary as a project supported by the United States "as being in our own interest as well as in the interest of Iraq and Jordan" (Report, p. 593).

C. The Interest of Mr. McFarlane and the National Security Council in the Aqaba Pipeline Was Not "Obtained" by Mr. Meese.

In order to magnify Mr. Meese's involvement in the Aqaba Pipeline Project, Mr. McKay's report declares that it was because of Attorney General Meese that Messrs. Rappaport and Wallach "successfully obtained the active interest of the NSC" (Report, p. 644). Mr. McKay concludes (Report, p. 670):

This participation in the Aqaba pipeline project security issue by a senior NSC staff member was the direct result of the telephone call from Attorney General Meese to Mr. McFarlane.

Mr. McKay's own report proves that these assertions are totally false. The NSC and Mr. McFarlane were involved and strongly supported the Aqaba project long before Mr. Meese's telephone call. The report states that a memorandum of June 1984 reflected Mr. McFarlane's active involvement in the project (Report, p. 589), and that after Mr. Rappaport's entry on the scene -- but before Mr. Wallach was retained -- Bechtel officials were sending a memorandum on the project to Mr. McFarlane (Report, pp. 636-639). The very high level of interest in the project on the part of the United States government long before Mr. Meese was ever told about it is shown by Mr. McKay's description of discussions in February 1985 between Prime Minister Peres and the American Ambassador to Israel, Samuel W. Lewis (Report, p. 622). The "financing package" to back up the Israeli nonaggression guarantee was then being developed by Bechtel, and the ambassador was familiar enough with its existence to convey that information to the Israeli Prime Minister.

The notion that Mr. Meese's telephone call of late May or early June 1985 was responsible for the NSC's interest in the project or for Mr. McFarlane's participation is particularly bizarre in view of Mr. McKay's elaborate description of a meeting held with Bechtel officials on May 2, 1985, at the NSC offices regarding the very same project (Report, pp. 640-642). It is plain from that description that the project had the support of Mr. McFarlane (who missed the meeting only because he was out of the country) and of the NSC's Director for Near East and South

Asia Affairs, Howard Teicher, and that both were eager to assist in developing a "security package" to guarantee Israel's nonaggression. Indeed, the project had enough high-level support within the United States Government in May 1985 that Mr. Teicher was able to tell the Bechtel representatives that Secretary of State Shultz would be discussing it with King Hussein on a visit to be held May 12-13, 1985, and that it could be on the agenda "for a later meeting between President Reagan and King Hussein" (Report, p. 641). Mr. McKay then reports:

Mr. Teicher suggested that the pipeline problem could be addressed by a Memorandum of Understanding between the United States and Jordan regarding the interest of the United States in the development and security of the Jordanian petroleum infrastructure.

Approximately one month before the telephone call that Mr. Meese made to Mr. McFarlane to introduce Mr. Wallach, the NSC was contemplating discussions on the pipeline between Secretary of State Shultz and King Hussein and thereafter between President Reagan and King Hussein, culminating in a government-to-government Memorandum of Understanding. Can anyone honestly believe that the brief telephone call to Mr. McFarlane by the Attorney General -- who had not been privy to any of these plans -- "spurred" the NSC's interest in the pipeline?

D. Mr. Meese's Telephone Call Was Only an Introduction and an Inquiry.

Both participants to the Meese-McFarlane telephone call agree that Mr. Meese did not advocate or support the project. He simply introduced Mr. Wallach as a friend and noted that the

project "might be a matter of national interest" (Report, p. 656). Mr. McFarlane's recollection is reported as follows (Report, p. 657):

Mr. Meese told Mr. McFarlane that he thought it was possible that Mr. McFarlane and the NSC staff should be involved in this matter. Mr. Meese asked Mr. McFarlane to advise Mr. Rappaport and Mr. Wallach whether the pipeline would be in the foreign policy interest of the United States.

Mr. McFarlane apparently did not tell Mr. Meese that he had already been involved in discussions regarding the Aqaba pipeline or that it was a potential subject to be discussed between President Reagan and King Hussein. He merely scheduled a meeting for Mr. Wallach for June 10, and that meeting was then postponed to June 24. At the June 24 meeting, he assigned a member of the NSC staff to follow through on the project.

There is no evidence that Mr. Meese had any other contact with the NSC or with Mr. McFarlane on this subject prior to receipt of the handwritten letter from Prime Minister Shimon Peres in September. Mr. McKay's report discusses extensive negotiations concerning the pipeline that went on between June and September (Report, pp. 666-702), without a single suggestion that Mr. Meese encouraged or participated in these discussions in any manner. ^{*}/ If Mr. Meese had, indeed, been interested in the success of the project, one would surely have expected some more

^{*}/ The report spends five pages detailing Mr. Meese's presence at the American Bar Association convention in London in July 1985, which was also attended by Bob Wallach (Report, pp. 684-688). Mr. Wallach introduced Mr. Meese to some OPIC officials, but the pipeline was not discussed.

active role than the single telephone conversation with Mr. McFarlane and the inquiry which, in Mr. McFarlane's words, "kind of left that [NSC's potential involvement] up to me" (Report, pp. 657-658).

E. Mr. Meese Was Not Aware of Any Plan To Pay a Bribe to the Israeli Labor Party, and It Appears that No Such Plan Existed.

The entirety of Mr. McKay's ground for conducting a massive investigation of a sensitive but perfectly legitimate foreign-policy initiative is the claim that Mr. Meese should have known from Mr. Wallach's memorandum of September 25 that a bribe was to be paid to Israel's Labor Party. The notion that a bribe would have been needed to obtain Israel's consent to the project is far-fetched because, as was obvious to all participants, Israel stood to benefit substantially from the arrangement. There was no need, therefore, for a bribe, and no reason to suspect one.

But in any case, Mr. Meese never took note of the particular language now being highlighted in Mr. Wallach's memorandum, if he read it at all, and never thought of the arrangement as involving an improper payment to an Israeli political party. Mr. Wallach sent many memoranda to Mr. Meese, and Mr. Meese did not have the time to read them all.

Mr. Meese testified in a deposition in Mr. McKay's office on November 22, 1987, about the Aqaba pipeline. He was first shown a memorandum from Mr. Wallach dated September 12, 1985, and he said about it "that while I probably skimmed the

memorandum, I did not read it carefully." He later stated also that he had a "general recollection" of receiving and reading the two memoranda dated September 25, 1985. Mr. Meese's understanding was that the Government of Israel "would be receiving money from the pipeline project in some way." Thereafter, Mr. Meese read directly from the September 25 memorandum, a copy of which was in his hand because it had been produced by Mr. McKay's staff during the deposition and was given to him. He stated that he did not "recall specifically" knowing the details of any arrangement with Israel but that the text of the Wallach memorandum "would be consistent with my understanding."

Later in his deposition, Mr. Meese made it clear that he was not aware in 1985 of any proposal to provide funds for Israel's Labor Party:

Q. Did you ever discuss with Mr. Wallach any concerns you may have had about the propriety of the Labor party receiving a portion of the funds in this project, any concerns you had about that?

A. No. I don't recall discussing the Labor party receiving the funds at all. It's in that memorandum and I probably read it at the time to the extent that I read it that carefully but I don't recall it ever being discussed.

* * * *

Q. Did he give you any indication as to how many people knew about this Israeli stake and the Labor party stake in the pipeline project?

A. No. My recollection -- the only recollection I have is of -- particularly in

regard to that reference to quid pro quo in the 25th of September memo, ^{*}was it was the general benefit to Israel. ✓

I have no even general recollection of the benefit to the Labor Party other than as is expressed in that other memorandum that you showed me.

A few minutes later in the deposition -- in an answer omitted from Mr. McKay's report -- Mr. Meese made it clear that he had not even focused on the words suggesting payments to the Labor Party until he was shown a copy of the memorandum on the day of the deposition:

Q. Well, apart from your discussion with Mr. McFarlane about the general Israeli government financial interest in the project, do you have any recollection of having a specific discussion with Mr. McFarlane about the Labor Party's financial interest in the operation?

A. No.

Q. No, you have no recollection?

A. I have no recollection and I don't really recall having focused on that until reading it in the memo there.

Q. Okay. Until reading it in the memo there today?

A. Today, yes.

The full text of Mr. Meese's testimony relevant to this subject is attached to this Response as Appendix 10. It

^{*}/ The documents quoted by Mr. McKay make it entirely clear that when Mr. Wallach described a "never-to-be-stated but fully understood quid pro quo" in connection with the project in a memorandum of September 25, he was not talking about the alleged payment to the Labor Party but about the arrangement to provide oil or money to Israel from the pipeline production. The documents repeatedly refer to this aspect of the proposal as a "quid pro quo" (Report, pp. 629, 633, 635).

constitutes pages 39-50 of his deposition of November 22, 1987. Because the testimony was reported out of context in press stories following Mr. Meese's public denial that he was aware of the ten allegedly incriminatory words in Mr. Wallach's memorandum, we submitted to Mr. McKay's office a sworn declaration dated February 17, 1988, explaining the testimony and noting that that Mr. Meese was, at one point, reading from a copy of the memorandum of September 25. A copy of that Declaration is included in Appendix 10.

In sum, the ten offending words in Mr. Wallach's memorandum were skimmed, if seen at all, by Mr. Meese. He did not understand from the memorandum that any illegal or improper conduct was being described, and his testimony has consistently been to the same effect. In fact, Mr. McKay's investigation indicates why Mr. Meese was not conscious of any illegal activity. There was none.

F. Notwithstanding Mr. McKay's Protestations that He Cannot Secure Evidence, the Participants Have Denied Any Bribe.

Mr. McKay implies that he could not get the full truth because his investigation was "hampered" by Mr. Wallach's assertion of a privilege against self-incrimination, Mr. Rappaport's refusal to provide more than an unsworn preliminary interview, and the unavailability of Israeli officials, including Mr. Peres (Report, pp. 39-40).

We note, first of all, that Mr. McKay was apparently able to obtain "the full cooperation of Bechtel and its current and former employees; and from the White House, the National Security Council, the Department of State, the Department of Justice, the Overseas Private Investment Corporation, the Central Intelligence Agency, and others." From these and other sources, Mr. McKay received "voluminous amounts of documentary evidence" related to the project. It is difficult to believe that the testimony of these three witnesses could be expected to produce evidence of wrongdoing when not even a single piece of circumstantial evidence could be found from any of the many sources Mr. McKay examined.

Leaving this practical point aside, however, Mr. McKay wholly ignores the public statements by each of these individuals that squarely deny any bribe offer or other illegality.

Prime Minister Peres was interviewed on February 21, 1988, on "This Week With David Brinkley," and he replied as follows:

MR. DONALDSON: Mr. Foreign Minister, as you know, there are allegations that there is some scheme to pay off Israeli officials. Your name has been prominently mentioned --

FOREIGN MINISTER PERES: Oh, that's foolish.

MR. DONALDSON: -- in connection with this pipeline. Did anyone --

FOREIGN MINISTER PERES: That is so foolish, it doesn't call for any answer. You know --

MR. DONALDSON: -- Well, let me just give you an opportunity to deny it categorically. At anytime --

FOREIGN MINISTER PERES: -- I deny it --

MR. DONALDSON: -- did anyone ever approach you with any idea that perhaps you could be of assistance in giving a security guarantee for this pipeline for which you or the party would receive remuneration?

FOREIGN PRIME MINISTER PERES: You know, it's a shame even to relate myself to such an accusation. If somebody would come to me and suggest it for the party or for somebody else, he would be thrown out of the window. We never do it; we never did it.

Mr. Rappaport was interviewed on the NBC Nightly News on March 5, 1988, and he said:

INTERVIEWER IN LONDON: I suppose you know the whole deal from beginning to end was entirely legal.

RAPPAPORT: It still is.

INTERVIEWER: What about Mr. Meese's involvement in it?

RAPPAPORT: I don't think that he is involved in it.

NBC NEWS CORRESPONDENT JAMES POLK: . . . Wallach sent Meese this memo saying Israel would get up to \$70 million a year to leave the pipeline alone, as suggesting a portion of that money would be paid secretly to Israel's labor party. Rappaport denies plans for any such payments.

RAPPAPORT: Mr. Wallach may hardly be involved and is misinforming Mr. Meese in his memo.

POLK: Rappaport is apparently telling investigators the only thing he promised Israel was a portion of the oil supplies.

RAPPAPORT: There was no question of money or enumeration [remuneration] or anything for Israel in that.

Mr. Rappaport was also interviewed by the Israeli press, and his statements during that interview were reported by the Associated Press:

I have explained to [Economy Minister Gad] Yakoby and to Peres who also explained to others that here, apparently, we will have an exceptionally good deal. Not to speak about the terminal, which is very important . . . but the deal itself will give us close to \$500,000 a day over 10 years.

If so . . . I was ready to give a third of what we receive to the State [of Israel]. I want this to be clear. Not to Peres who does not take money, not to [Yitzhak] Shamir [now Israel's Prime Minister], who does not take money.

Mr. Rappaport's public statements on the subject are entirely consistent with the statements he has made to Mr. McKay, in which he "denied that any money was promised to the Labor Party" (Report, p. 719). Thus, there is no visible basis for Mr. McKay's "conclusion" that Mr. Rappaport's statements are entitled to no weight, while "Mr. Wallach's written accounting of his conversation with Mr. Rappaport probably was an accurate retelling/recounting of the conversation" (Report, p. 722).

Mr. Wallach was interviewed about the Aqaba pipeline on ABC Nightline on July 5, 1988, and he said that his memorandum "never intended any implication of bribery." In a separate letter attached as Appendix 3, Mr. Wallach's attorney explains that the language in the memorandum did not refer to a bribe.

Obviously, testimony under oath is preferable in an investigation to statements in other forms, including public interviews. But when an investigation turns up no evidence

whatever that any illegal act was committed, is it really fair to ignore the public and unsworn statements of the principal participants and to claim that the investigation is still not complete because of their refusal to come to the United States to appear before a grand jury?

G. There Was Never any Legal Basis Whatever for a Prosecution Under the Foreign Corrupt Practices Act.

A most disturbing aspect of the Aqaba pipeline investigation is the fact that there was no valid legal basis for a prosecution even if the worst interpretation were placed on Mr. Wallach's ten words, and an investigation proved that an offer to give money to the Israeli Labor Party had been made and accepted. Mr. McKay's stated conclusions -- that Mr. Wallach could be a "domestic concern" covered by the law (even though he was not alleged to have contributed to any improper payment), that telephone calls from Mr. Wallach to Mr. Meese relating to the pipeline would be prohibited acts covered by the law, and that Mr. Meese could be an aider-and-abettor of Mr. Wallach if he furthered the pipeline venture in any manner -- are entirely unsupportable under the language and legislative history of the law. We submitted a 65-page legal memorandum on this subject to Mr. McKay making five distinct legal points. The report fails to meet our arguments.

A copy of our legal memorandum is Appendix 8 to this Response. The legal points, briefly summarized, are as follows:

(1) The Foreign Corrupt Practices Act prohibits bribes that are paid to gain competitive commercial advantages such as exclusive licenses, government contracts, and so on. The FCPA does not prohibit payments made for foreign-relations purposes or to prevent countries from initiating aggressive attacks. If there had been an offer to pay the Labor Party in exchange for Israel's guarantee not to bomb the pipeline, that offer -- even if viewed as a bribe -- would not violate the Foreign Corrupt Practices Act.

(2) Only if a "domestic concern" -- i.e., a United States citizen -- offers or pays all or part of the bribe is the FCPA violated. In this case, it is undisputed that the payment -- if there had been any -- was to be made by Bruce Rappaport, a Swiss citizen. The fact that Mr. Wallach is an American citizen does not make him a "domestic concern" under the FCPA unless he offers or pays the bribe. The law does not govern bribes paid by foreign citizens.

(3) Only payments that are illegal in the foreign country where made are illegal under the FCPA -- a conclusion supported by an overwhelming body of legislative history that Mr. McKay ignores totally when he says that the FCPA prohibits payments "not illegal in the foreign country" (Report, p. 121 & n. 51). Under Israeli law, it was entirely lawful for Mr. Rappaport to make large contributions to the Labor Party -- as he had apparently been doing for many years. Hence even if money

was to go to Israel's Labor Party, the arrangement would be lawful under the FCPA.

(4) The Foreign Corrupt Practices Act is violated only if the mails or the telephone are used to further the corrupt payment. Use of the telephone by Messrs. Wallach and Meese to discuss, or even to advance, the Aqaba pipeline project -- as distinguished from the alleged bribe offer -- would not be covered by the law. Indeed, if the bribe offer had already been made and accepted, there was no way that a letter or telephone call could have furthered that bribe.

(5) In any event, mere knowledge by Mr. Meese of such an offer -- if he had had such knowledge -- would not be criminal. Mr. McKay's report declares that "Mr. Meese . . . took no action to terminate United States government involvement in the Aqaba pipeline project or even to notify other United States government authorities of the possible existence of an illegal scheme" (Report, p. 49). The suggestion that this inaction, if accompanied by "acts to further the commercial enterprise," amounts to aiding and abetting goes far beyond any established principles of criminal complicity.

H. Mr. Meese Undertook No "Unusual Official Activities" Relating to the Aqaba Pipeline.

Having discovered no crime or other impropriety in the long history of efforts made by many officials on behalf of the Aqaba pipeline project, Mr. McKay smears Mr. Meese by innuendo. He declares that Mr. Meese engaged in "unusual official

activities" in relation to the pipeline and hints that these might have been exchanged for favors received from Mr. Wallach, such as forgiveness of part of his legal fee, introduction to Mr. Chinn, or assistance in employing Mrs. Meese at the Multiple Sclerosis Society (Report, p. 113). The fact is that Mr. Meese engaged in no "unusual" activities and provided no special favors to Mr. Wallach in regard to the pipeline project.

The complete catalogue of Mr. Meese's actions in support of the pipeline are:

1. An introductory telephone call to Mr. McFarlane.
2. A handwritten response to Mr. Peres' handwritten letter.
3. A discussion with Mr. Peres, at the latter's request, during a reception at the Israeli embassy.
4. A discussion with Allan Gerson about a request for a legal opinion sent to the Department of Justice by OPIC.

Neither singly nor in combination does this amount to "unusual official activities." The pipeline project had obvious important foreign-policy implications. It was entirely appropriate for Mr. Meese to refer Mr. Wallach to Mr. McFarlane to see if Mr. McFarlane believed the proposal deserved further attention. (Mr. Meese did not even know that Mr. McFarlane had been substantially involved in earlier discussions.) It was appropriate -- indeed, diplomatically imperative -- to reply politely to Mr. Peres' letter and to speak with Mr. Peres, if Mr. Peres indicated a desire to do so, at an embassy reception honoring his visit to the United States. And there was

absolutely nothing wrong or improper in Mr. Meese's discussion with Deputy Assistant Attorney General Gerson on a matter pending in the Department of Justice. Mr. Gerson has not suggested that Mr. Meese asked him to do anything improper or sought to influence his legal judgment on the matter he was considering. In whose mind other than Mr. McKay's can these acts be termed "unusual official activities"?

Rather than undertaking "unusual" actions to assist Mr. Wallach, Mr. Meese was distinctly uninvolved on the Aqaba pipeline project. Given that Mr. McKay was investigating Mr. Meese, it is notable that Mr. McKay's account of efforts on behalf of the project (Report, pp. 561-814) discloses that, apart from frequent private social meetings with Mr. Wallach (in which they discussed many other subjects), Mr. Meese participated in only three meetings involving the Aqaba pipeline -- when he met with Mr. McFarlane to ask how to respond to Prime Minister Peres' handwritten letter, when he met with Mr. Peres at the Israeli Embassy, and when he met with Mr. Gerson after the OPIC inquiry had come to the Department of Justice. In none of those meetings was Mr. Meese lobbying for the project or seeking to further it.

If Mr. Meese had, in fact, been trying to help the project because of Mr. Wallach's participation, one would have expected him to be present at some of the 86 other meetings described in the report or to have placed some telephone calls to people whose decisions were important in development of the project. Not only did Mr. Meese not initiate such calls, but no one ever thought of calling him. If, as Mr. McKay implies, the

National Security Council's zeal was attributable to Mr. Meese's telephone call to Mr. McFarlane, why did no one from the NSC -- or even Mr. McFarlane himself -- call Mr. Meese to advise him how matters were progressing?

Indeed, Mr. Wallach's conduct demonstrated that he did not request Mr. Meese's intervention. Mr. McKay's report discloses that during the American Bar Association convention in London in the summer of 1985, Mr. Wallach introduced Mr. Meese to two OPIC officials (Report, p. 687). The Aqaba pipeline was not discussed, however. If Mr. Meese was then engaging in "unusual official activities" on behalf of the pipeline as a favor to Mr. Wallach, why did he not discuss the pipeline with the OPIC officials in London?

The answer is that Mr. Meese was asked by Mr. Wallach to do only what was usual, reasonable and proper, and that is all that Mr. Meese did. And when a handwritten letter from the Israeli Prime Minister was delivered to him, Mr. Meese responded appropriately -- by referring the Prime Minister to the President's Assistant for National Security Affairs.

I. The Opinion Sought by OPIC from The Office of Legal Counsel Was Proper and Was Not An "Abuse" of The Department of Justice's Resources.

Mr. McKay grossly mischaracterizes Mr. Meese's role in the request by the Overseas Private Investment Corporation ("OPIC") for a legal opinion as to the enforceability of the proposed assignment of Israeli aid funds to provide financial

insurance for the "security package." He accuses Mr. Meese of "authoriz[ing] what was in essence the private use by Mr. Wallach of the Department of Justice Office of Legal Counsel to aid the pipeline project" (Report, p. 117). The facts are so far from Mr. McKay's account that it is difficult even to detect a resemblance.

It is clear, first of all, that OPIC's request for a legal opinion was the type of inquiry that the Department of Justice routinely receives from other agencies. Issuing such opinions are a part of the Department's mandated responsibilities. As the head of the Department, Mr. Meese's office often received such inquiries, and they were forwarded, as a matter of course, to the Office of Legal Counsel, which is indeed the "office that usually handled such requests" (Report, p. 571). That such a formal request would be addressed from OPIC's General Counsel to the Attorney General raises no conceivable inference of impropriety on Mr. Meese's part.

Moreover, it is clear that Mr. Meese's understanding was that the request was being handled through normal Office of Legal Counsel channels. Mr. Gerson, whom Mr. Meese knew to be working on the matter, was at the time the only Deputy Assistant Attorney General at the Office of Legal Counsel. He would have received the assignment no matter how it first arrived in the office. Mr. Gerson was, moreover, a specialist in foreign relations issues such as those presented by the OPIC request. Thus, the fact that Mr. Meese knew that Mr. Gerson was working on a response to OPIC's -- not Mr. Wallach's -- formal inquiry would not give rise

to any suggestion of impropriety. Mr. Meese testified that when he received the memo from Mr. Gerson, he "assumed that it was being handled by the Office of Legal Counsel and . . . concluded from the Gerson memo that the problem was on its way to a solution" (Report, p. 758). There is nothing to suggest otherwise.

Indeed, the most remarkable aspect of Mr. McKay's discussion of the entire issue is that never, in the course of the entire report, does he disclose the conclusion that Mr. Gerson's final memo -- the only one Mr. Meese received -- actually contained. The fact is that Mr. Gerson's memo reached a negative opinion about the legality of the proposed assignment. In response to OPIC's request for a "formal legal opinion" that the assignment is consistent with U.S. law and "will be 'enforceable' in a U.S. court of law," Mr. Gerson stated, "[C]learly, it is ridiculous to think of Israel, or any other country, having an enforceable right to U.S. foreign aid." He concluded flatly, "What we are dealing with here is not an enforceable claim . . . but an 'expectancy' of receipt of foreign aid." The alternative proposal that Mr. Gerson went on to suggest -- which is the only part of the key memo to appear anywhere in Mr. McKay's report -- was that "Israel commit itself, without involving the U.S. or opening up the possibility of claims against the U.S., to OPIC and the co-insurer" -- a proposal that had already been rejected by Israel.

CONCLUSION

Any person holding public office in a democratic society must be prepared for criticism of his public and private life. An office-holder who takes controversial positions on policy issues should expect even more intense scrutiny of his conduct, and he cannot complain if the public vigorously debates his qualifications and his record.

With that heated public discussion, however, comes a danger that has been realized in this instance. Standards that are applied to no one else suddenly emerge as a unique measure for condemning acts of the controversial public official. In judging him and him alone, ordinary human emotions and relationships such as loyalty and friendship become grounds for suspicion and are transformed from virtues to vices.

Mr. McKay's statutory duty was to determine whether to file criminal charges against Attorney General Meese. He correctly determined that it would be wrong to initiate any criminal proceedings, and he set out facts and conclusions in his report that largely exonerate Mr. Meese on most of the subjects into which he inquired. But Mr. McKay's report went beyond its statutory bounds and included unjustified declarations that the law had been violated and generalized conclusions that are not supported by evidence.

These extraneous findings rest on criteria that are not normally applied in the criminal law. Mr. McKay seeks to brand Mr. Meese with criminal violations, albeit not in formal proceedings, because Mr. Meese procrastinated in gathering tax

records or because he trusted the legal efficacy of a document drafted for him by a member of his staff. Is it conceivable that a neutral prosecutor confronted with a publicly unknown accused would have dreamt of such allegations?

By the same token, Attorney General Meese's relationship with a law school classmate who had been highly regarded as a trial lawyer and as a leader of the San Francisco bar has become a focus of suspicion. The ordinary marks of friendship -- frequent conversations and meetings at meal-times, advice and assistance on family and financial matters, exchanges of token gifts at celebratory occasions -- are dissected and microscopically analyzed for tell-tale signs of impure motivation.

E. Robert Wallach was not the first private citizen in our history to offer advice and be available for consultation by highly-placed government officials. There are many noteworthy predecessors. Abe Fortas played that role for Senator and President Lyndon Johnson, and Felix Frankfurter did it for many New Deal office-holders, as well as for President Roosevelt. Most Cabinet officials have long-time acquaintances to whom they turn for occasional advice and on whom they rely to provide a non-governmental perspective. There is no reason to assume, as Mr. McKay does, that everything done at Mr. Wallach's suggestion was "unusual" or questionable.

The independent counsel law is designed to satisfy the public that high government officials will be judged, for purpose of the criminal law, by no different standard than is the

ordinary citizen. We are satisfied that if Edwin Meese III had been granted that equality, this investigation would have been much shorter than it was and the prosecutor would quickly have determined that there was no conceivable basis for any criminal proceeding.

Respectfully submitted,

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JAMES E. ROCAP, III
NIKI KUCKES
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2555 M Street, N.W., Suite 500
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Counsel for Attorney General
Edwin Meese III

July 14, 1988

APPENDICES

**TO THE RESPONSE OF EDWIN MEESE III
TO REPORT OF INDEPENDENT COUNSEL**

1. Opinion letter of Reid H. Weingarten, July 14, 1988, regarding Mr. Meese's ownership of certain shares of stock in the Regional Bell Operating Companies; Curriculum Vitae of Mr. Weingarten.
2. Opinion letter of Cono R. Namorato and Richard E. Timbie, July 13, 1988, regarding the filing of the 1985 income tax return; Curriculum Vitae of Messrs. Namorato and Timbie.
3. Letter from George G. Walker, attorney for E. Robert Wallach, June 15, 1988, regarding relevant information that could be obtained from Mr. Wallach.
4. Letter from Cristina C. Arguedas, attorney for W. Franklyn Chinn, July 11, 1988, regarding relevant information that could be obtained from Mr. Chinn.
5. Letter from Albert J. Krieger, attorney for Dr. R. Kent London, July 13, 1988, regarding relevant information that could be obtained from Dr. London.
6. Portion of the February 24, 1988, Submission to the Office of Independent Counsel on Behalf of Edwin Meese III Regarding The Regional Bell Operating Company Stock Issue, Relating to the Validity of the "Transfer of Property" Document.
7. Portion of the February 24, 1988, Submission to the Office of Independent Counsel on Behalf of Edwin Meese III Regarding The Regional Bell Operating Company Stock Issue, Relating to Other Legal Deficiencies in Mr. McKay's Claim that Section 208(a) "Probably" Was Violated.
8. Portion of the February 29, 1988, Submission to the Office of Independent Counsel on Behalf of Edwin Meese III Regarding the Aqaba Pipeline Project Issue.
9. Portion of the June 13, 1988, Submission to the Office of Independent Counsel on Behalf of Edwin Meese III Regarding The 1985 Income Tax Issue.
10. Deposition Testimony of Edwin Meese III, November 22, 1987, pp. 39-50, and Declaration of Edwin Meese III, February 17, 1988, Regarding Deposition Testimony of November 22, 1987.

STEPTOE & JOHNSON

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REID H. WEINGARTEN

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July 14, 1988

Nathan Lewin, Esq.
Miller, Cassidy, Larroca
& Lewin
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

Dear Mr. Lewin:

You have asked me, and I have agreed, to render an independent legal opinion as to whether or not Attorney General Edwin Meese III violated 18 U.S.C. § 208(a) in connection with his ownership of certain telephone stocks. We have agreed that the following conditions will apply to my engagement:

- A. My opinion shall be based exclusively upon the following materials which you have provided to me:
 1. The February 24, 1988 legal memorandum and accompanying exhibits which you submitted to the Independent Counsel, entitled "On the Regional Bell Operating Company Issue";
 2. Mr. Meese's grand jury testimony as follows:

<u>Date</u>	<u>Page(s)</u>
11/03/87	295-298; 356-361
11/22/87	92
04/18/88	2-149

3. Ursula Meese's grand jury testimony as follows:

<u>Date</u>	<u>Page(s)</u>
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04/21/88

99-126

4. A debriefing memorandum of John Richardson dated March 9, 1988.
- B. No portions of the Report of the Independent Counsel (the "McKay Report") have been or will be disclosed to me and you have not discussed the contents of the Report with me.
- C. I will be compensated at my normal hourly rate. This compensation is not contingent in any manner on the result or content of my legal opinion.
- D. I have advised you that I have been appointed on a part-time basis as a Special Assistant to the United States Attorney for the District of Alaska in the case of U.S. v. Dischner, et al., and that this appointment limits my ability to interact with the Department of Justice. We have agreed that my legal opinion in this matter will not be submitted to the Justice Department on behalf of Mr. Meese without an appropriate waiver.
- E. For purposes of this opinion, I will assume that there is sufficient evidence to establish all elements of 18 U.S.C. § 208(a) except "knowledge" of a "financial interest." My analysis will be limited to determining whether or not there is sufficient evidence in the record you have provided me to establish the requisite "knowledge" to prove a violation of the statute under the standard of the United States Attorney's Manual, i.e., "that the admissible evidence will probably be sufficient to obtain and sustain a conviction."

The evidence significant to this issue appears to be as follows:

1. In advance of his 1985 Senate confirmation hearings to be Attorney General, Mr. Meese agreed to sell all of his telephone stocks and bonds so as to avoid all questions of conflict-of-interest. Mr. Meese agreed to divest himself of his telephone company interests by May 24, 1985. At the time of the Senate hearings, Mr. Meese owned some AT&T shares and debentures

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and a small number of shares of stocks in all of the "Baby Bell" companies which emerged from the AT&T break-up in 1982.

2. Prior to May 23, 1985, Mr. Meese conveyed to Frank Chinn (who had been selected to manage Mr. Meese's finances while Mr. Meese was Attorney General) his AT&T stock and debentures and 34 shares of BellSouth. Mr. Meese apparently could not locate 17 shares of stock he held in each regional telephone company as a result of his AT&T stock ownership (the "Baby Bell stocks"). On May 23, 1985, Mr. Meese executed a "Transfer of Property" document to Mr. Chinn, giving Mr. Chinn "all right, title and interest" in the Baby Bell stocks which had not been found, and representing to Mr. Chinn that the actual securities would be delivered "as soon as they were available." According to this document, after Mr. Chinn received the Baby Bell stocks he was to "dispose of the above-listed securities in such manner as he, in his sole discretion, deems appropriate." Whatever the actual legal effect of this "Transfer of Property" document, there is nothing in the record which suggests that with this document Mr. Meese was trying to do anything other than make a good faith effort to divest himself of the misplaced stocks.

3. Mr. Meese thereafter sought to obtain replacement certificates for the missing Baby Bell stocks. This was not accomplished until August 1987. Doubtless, the replacement stocks could have been obtained more expeditiously with a more concerted effort by Mr. Meese; nevertheless, the effort to obtain the replacements is consistent with a belief by Mr. Meese that the original stocks had been lost and that he had an obligation to provide Mr. Chinn with replacements.

4. Dividend checks and stock dividends from the Baby Bells were mailed to Mr. Meese and not to Mr. Chinn after May 23, 1985. This mail, however, was not opened and over 125 checks were not cashed or deposited by Mr. Meese until after Mr. Meese terminated his relationship with Mr. Chinn in 1987. Mr. Meese testified that he collected this mail and preserved it with the intention of sending it all to Mr. Chinn along with the replacement certificates when the latter arrived. Obviously, Mr. Meese could have sent Mr. Chinn the checks as he received them or directed that the checks go directly to Mr. Chinn. Nevertheless, the unopened mail is persuasive evidence that Mr. Meese did not believe that he was entitled to the proceeds of the Baby Bell stocks after May 23, 1985, because he did not then own the stock. Indeed, Mrs. Meese testified in the grand jury that when she asked her husband if she could cash the dividends, he responded: "You can't touch those. We don't own those. They go to Frank Chinn."

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5. Mr. Meese paid income taxes on the dividends from the Baby Bell stocks in 1985 and 1986 based on the IRS 1099 forms he received. These payments could constitute another badge of ownership by Mr. Meese; however, I do not view Mr. Meese's tax treatment of the dividend checks as dispositive of the issue. It would not be an abnormal reaction for someone to pay tax on the dividends (a small amount of money) upon receiving the 1099 forms (particularly if one were the Attorney General of the United States), rather than engaging the IRS in a dispute over the ownership issue.

Similarly, Mr. Meese's representations to the company providing the replacement certificates that he was the "absolute owner" of the shares, are not necessarily inconsistent with his belief that, in fact, he had passed ownership of the stocks to Mr. Chinn. It is not illogical that Mr. Meese was then seeking to obtain the replacement certificates with the least bother and with the intention of then sending them along to Mr. Chinn.

6. Section 208(b) of Title 18 provides that the restrictions of § 208(a) "shall not apply" if the official obtains in advance "a written determination" that the official's financial interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from him. On July 26, 1982, the Counsel to the President granted a waiver to Mr. Meese as to his participation in "meetings to discuss the Administration's policy and strategy for legislatively restructuring the telecommunications industry or in decisions necessary to implement these policy and strategy recommendations." The expressed basis for the 1982 waiver was that the size of Mr. Meese's financial interest in AT&T was too small to affect his official judgment.^{1/}

In January, 1987, Mr. Meese sought and received a second waiver from White House Counsel concerning his ownership interests in the telephone companies. An argument could be constructed to the effect that Mr. Meese's decision to seek a second waiver reflected his belief that the first waiver was insufficient to cover his activities as Attorney General, or some

^{1/} It is my view that as a practical matter, the first waiver, never withdrawn or repealed, made the prospect of a successful prosecution of Mr. Meese for violation of § 208(a) in connection with his telephone stock very doubtful, as Mr. Meese could mount a very effective defense that he reasonably relied on the waiver in his 1985-1986 official dealings with telephone companies.

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concern that he was at risk because of his contact with the telecommunications industry due to his telephone stock ownership. A more persuasive reason for the second waiver request, however, is found in Mr. Meese's grand jury testimony. Mr. Meese explained that in January 1987 the Attorney General was required to submit a formal report to Judge Harold Greene -- a tri-annual review of the AT&T consent decree -- which at that time was the most significant legal event in the case involving the Justice Department since the decree itself. Mr. Meese's staff recommended that because the lost Baby Bell stock certificates had not yet not been replaced and transferred, the Attorney General should, in an abundance of caution, seek another waiver. That another waiver was granted by the White House is strong evidence that Mr. Meese's ownership of telephone stock was never perceived at the time by those close to the events to be a threat to the integrity of the governmental effort to restructure the telecommunications industry.

7. In the summer of 1987, Mr. Meese learned that Mr. Chinn had been implicated in the Wedtech investigation. He then moved to terminate his financial relationship with Mr. Chinn and asked for a return of the stock. In response thereto, Mr. Chinn sent him a "Re-Transfer of Property" document, purporting to "re-transfer" to Mr. Meese "all right, title and interest" in the Baby Bell stocks which title and stocks had "been held by the transferor (Mr. Chinn) since May 23, 1985."^{2/} Whatever the actual legal effect of this document, it represents on its face the opinion of Mr. Chinn that he had "right, title and interest" in those stocks during the critical period.

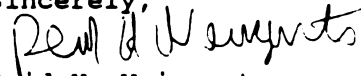
In sum, while there may well have been a technical question as to who legally owned and who had the risk of gain or loss with the Baby Bell stock after May 23, 1985 -- Mr. Chinn or Mr. Meese -- the evidence presented to me as to Mr. Meese's "knowledge" of the ownership of the telephone stock is less controversial. In my opinion, the weight of the evidence which I have reviewed supports the conclusion that Mr. Meese believed that he had made a bona fide transfer of the stock in question to Mr. Chinn on May 23, 1985. It is therefore my opinion that the evidence of Mr. Meese's "knowledge" would not be sufficient to

^{2/} By this document Mr. Chinn also purported to transfer to the Meeses "all right, title and interest to the dividends earned on the above-listed stocks between May 23, 1985 and present."

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support a § 208(a) prosecution under the guidelines set forth in the United States Attorney's Manual because the admissible evidence likely would not be sufficient to obtain and sustain a conviction.

Sincerely,

A handwritten signature in cursive script, appearing to read "Reid H. Weingarten".

Reid H. Weingarten

REID H. WEINGARTEN

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Washington, D.C. 20036 (202) 342-0697 - Home

EMPLOYMENT EXPERIENCE

STEPTOE & JOHNSON
Attorney
December 1987 - Present

Responsibilities include representing clients in complex criminal matters at the pre-trial, trial and post-trial stages, including cases involving RICO, bank fraud, bribery government procurement fraud, tax and securities matters.

Trial Attorney
November 1977 - December 1987
U.S. Department of Justice
Public Integrity Section
Criminal Division
Washington, D.C. 20530

Responsibilities included preparing and trying major criminal cases; briefing and arguing appeals; supervising corruption investigations conducted by the Federal Bureau of Investigation and the Internal Revenue Service.

MAJOR FEDERAL TRIALS

United States v. Walter Nixon, (S.D. Miss. 1986)
(Federal Judge)

United States v. Paul H. Holmes, (S.D. Miss. 1985)
(District Attorney)

United States v. Harold Lawrence, (W.D. Tenn. 1985)
(DEA Agent)

United States v. George V. Hansen, (D.C. 1984)
(Congressman from Idaho)

United States v. Frank Robin, (N.D. Ga. 1983)
(Federal Prosecutor)

United States v. Alcee Hastings, (S.D. Fla. 1983)
(Federal Judge)

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United States v. William Borders, (N.D. Ga. 1983)
(Attorney)

United States v. John Jenrette, (D.C. 1981)
(Congressman from South Carolina)

United States v. William Lowe, (South Carolina 1980)
(Grand Jury Foreman)

United States v. Carroll Lynn, (S.D. Texas 1979)
(Houston Police Chief)

MAJOR FEDERAL APPELLATE CASES BRIEFED AND/OR ARGUED

United States v. Nixon, 5th Cir. 1986

United States v. Holmes, 5th Cir. 1986

United States v. Royals, 5th Cir. 1985

United States v. Hansen, D.C. Court of Appeals, 1985

United States v. Jenrette, D.C. Court of Appeals, 1984

United States v. Borders, 11th Cir. 1982

United States v. Lowe, 4th Cir. 1980

United States v. Lynn, 5th Cir. 1979

DEPARTMENT OF JUSTICE AWARDS

Outstanding Performance Awards - 1979 through 1987
Special Achievement Award - 1985

Special Commendation Award - 1981 and 1983

Younger Federal Lawyer Award - 1984

Deputy District Attorney
September 1975 - November 1977
Dauphin County District Attorney's Office
Harrisburg, Pennsylvania

Responsibilities included trying over 30 felony jury trials; preparing hundreds of other felony cases that were resolved with guilty pleas; and briefing and arguing over 25 appeals in the Pennsylvania Superior and Supreme Courts and the Third Circuit Court of Appeals.

Page 3

EDUCATION

Legal: Dickinson Law School, Carlisle, Pennsylvania J.D. 1975

Hague Academy of International Law, Certificate of Attendance, 1974

University of Brussels, Seminar on EEC Law, 1974

Undergraduate: Cornell University, Ithaca, New York B.S. 1971

WRITING EXPERIENCE

The Kentucky Law Journal, "Judicial Misconduct -- A View From The Department of Justice" (Third issue, 1988)

The Prosecution of Public Corruption, "Legislative Corruption" pp. 55-65 (U.S. Department of Justice, Feb. 1988)

TEACHING EXPERIENCE

Lecturer, FBI Academy, Quantico, Virginia, 1979 to 1987;

Lecturer, Attorney General's Advocacy Institute, 1980 to 1987;

Lecturer, District of Columbia United States Attorney's Office Training Session, 1985 to 1987;

Lecturer, University of Mississippi Law School, 1987;

Lecturer, University of Kentucky Symposium on Judicial Discipline, October, 1987;

Instructor, CLE Seminar in Nashville, Tennessee, February 1988, "Criminal Defense & Trial Techniques"

Lecturer, Georgetown Law Center, 1988

Lecturer, Loyola Law School, 1988

MISCELLANEOUS

Appointed in February 1988 as Special Prosecutor, United States Attorney's office for the District of Alaska, for U.S. v. Dischner, et al.

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July 13, 1988

Nathan Lewin, Esq.
Miller Cassidy Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Dear Mr. Lewin:

You have asked for our opinion on whether the conduct of Edwin Meese III in connection with the filing of his 1985 joint federal income tax return amounted to a violation of 26 USC § 7203 or § 7206(1). You have expressly declined to discuss with us or disclose to us the contents of, or any conclusion in, the Report of Independent Counsel James C. McKay, filed July 5, 1988.

We understand the facts to be as follows.

1. Prior to 1985, Mr. and Mrs. Meese held securities in approximately 20 to 25 corporations. Most of the securities had been obtained by Mrs. Meese through inheritance; others had been purchased for Mrs. Meese in the early 1950's by her father.
2. During his confirmation hearings, Mr. Meese promised the Senate that he and his wife would divest themselves of ownership of certain energy and telecommunications securities. After the hearings, he decided to sell all family securities and enter into a "limited blind partnership" arrangement with respect to the investment of the proceeds. That decision was described in a May 24, 1985, memorandum circulated to all "Heads of Offices, Bureaus, Boards and Divisions" within the Department of Justice. The securities were sold by Mr. Meese's broker and the sales were reported to the IRS on Form 1099B.

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3. Since beginning federal service, Mr. Meese has regularly deferred completion and filing of his return to October 15, the latest possible date for which extensions may be secured. Since 1981, Mr. Meese has utilized the services of John R. McKean, a Certified Public Accountant in Oakland, California, to prepare his tax returns. His regular routine is to deliver the necessary financial data to Mr. McKean shortly before the October 15 deadline and leave completion of the return in the hands of Mr. McKean.
4. Mr. Meese collected the data for the 1985 tax return shortly before leaving on a trip to Mexico on October 8, 1986. He called Mr. McKean to tell him that he would deliver the data when he was scheduled to be in Northern California on October 13. Mr. Meese also told Mr. McKean that he had sold the family securities in May 1985 but had not been able to locate the cost basis for those securities. Mr. McKean advised Mr. Meese that he would prepare the return without reference to the securities transactions and that an amended return would be filed when the cost basis figures were located. Following this conversation, Mr. McKean had a member of his staff include the following notation in his workpapers with respect to the 1985 return:

Stocks and bonds were sold during 1985 but the information was unavailable for processing the 1985 Tax Return. When the information becomes available, we will file amended tax returns. We are assuming no gain or loss on the sales at this time.
5. On October 13, 1986, Mr. Meese delivered to Mr. McKean the information for his 1985 return and an executed blank Form 1040 individual income tax return. Mr. McKean prepared the return, making no reference to the securities transactions, and filed it on October 15. Neither Mr. Meese nor Mr. McKean discussed, prior to October 15, 1986, whether inclusion of the securities transactions on the tax return would result in a greater or lesser tax obligation. Mr. McKean believed at the time, however, that the sales likely had resulted in a net gain and that Mr. Meese probably owed some additional tax.
6. Prior to October 15, Mr. Meese had attempted to obtain information on the cost basis of the stock through a search of his own files, but had been unable to locate any documents that would provide such information. Also

in October, he had directed his office to contact the attorney who had represented Mrs. Meese's mother's estate to obtain the cost basis for the stock that had passed through the estate. The attorney mailed the requested information on Friday, October 10, to the Meeses' home in Virginia, but Mr. Meese did not receive the information until his return from California, when it was too late for inclusion on the return.

7. Sometime before mid-January 1987, Mr. Meese provided to Mr. McKean a schedule and supporting documentation for the sale proceeds and cost basis of all the securities that had been obtained through inheritance. In March 1987, Mr. McKean responded with a schedule indicating the information he needed on the other securities to complete the amended return.
8. The Independent Counsel was appointed to investigate Mr. Meese on May 11, 1987. Within a week of his appointment, the Independent Counsel requested, through counsel, that Mr. Meese provide his 1980 through 1985 tax returns. A subpoena was later issued for these returns on May 28, 1987. Shortly after being informed of the request, Mr. Meese called Mr. McKean to obtain a copy of the 1985 return for the Independent Counsel. In the course of that telephone conversation, Mr. Meese asked Mr. McKean if there was a procedure for advising the IRS that an 1985 amended return would be filed. Mr. McKean advised Mr. Meese that he was aware of no such procedure. He noted that his workpapers reflected the fact that a decision had been made to amend the 1985 return and offered to send Mr. Meese a letter confirming that fact.
9. Later in 1987, while reviewing his records in response to the Independent Counsel's subpoenas, Mr. Meese found a stock ledger from the 1950's that had been maintained by Mrs. Meese's father, and a "Securities and Income Record" from the early 1980's that had been started by Mrs. Meese. These records, which contained the dates of acquisition of certain stocks but not the cost basis, were provided to Mr. McKean in October 1987. Mr. McKean's office then undertook the additional research to obtain the necessary cost basis information. Mr. McKean completed the amended 1985 return in January 1988. It was filed in early February 1988, and an additional liability of \$2,454, plus interest, was paid.

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You have also provided us with the accountants' workpapers from Mr. McKean's files for the original and amended 1985 returns, the June 27, 1988, Declaration of Mr. McKean setting forth the circumstances surrounding the filing of the original 1985 return, the testimony of Mr. and Mrs. Meese on the subject, the June 13, 1988, Declaration of Mr. Meese with respect to this matter, and other information that, while relevant, does not materially affect our opinion.

In our opinion, the above facts do not describe a violation of any criminal provision of the Internal Revenue Code. It would not be necessary to invoke prosecutorial discretion to conclude that Mr. Meese should not be indicted for failing to report the securities transactions on his returns. The available evidence, taken in the light most favorable to the prosecution, simply would not make out a prima facie case. Indeed, in our view, the issue does not even present a "close case."

Section 7203 is violated when a taxpayer willfully fails to file a return or supply information required by the Internal Revenue Code. Section 7206(1) is violated when a taxpayer willfully signs a tax return that he does not believe to be true and correct as to every material matter. The government might well be able to prove that Mr. Meese failed to supply required information on his 1985 return and that he signed a blank return knowing that the securities transactions would be omitted. However, if Mr. Meese were to be charged with violating § 7203 or § 7206(1), an indispensable element of the government's affirmative case would be proof beyond a reasonable doubt that Mr. Meese acted with specific criminal intent -- that is, that he voluntarily and intentionally violated a known legal duty.

It is well settled that willfulness cannot be inferred from the mere fact that the taxpayer knew or should have known that his return was incomplete. Criminal intent must be proven by independent evidence that he intended to violate the law. There is obviously no direct evidence that Mr. Meese intended to violate the tax laws, and so if Mr. Meese were indicted under § 7203 or § 7206(1), the prosecution would have to base its case on the inferences that a jury could draw from Mr. Meese's conduct.

Willfulness is normally shown, at least in part, by a pattern of omitted or erroneous information on a series of returns. Here we are dealing with a single return and, indeed, a single set of related transactions that arose out of a unique event in Mr. Meese's life.

Willfulness can also be shown by secret transactions, falsification or destruction of records and other acts of concealment. There is no suggestion of such conduct in this case. To the contrary, the securities sales at issue were announced in

advance to senior officials of the Department of Justice, conducted through a broker, and duly reported to the IRS on Form 1099B. Accurate records of the sale transactions were given to the return preparer. There is no suggestion that Mr. Meese concealed or destroyed any of the records that the preparer required to determine the cost basis of the stock for tax purposes. None of those records had been prepared by Mr. Meese, and some had not previously been in Mr. Meese's possession. He made an attempt to obtain them prior to the filing of the return, and he ultimately did obtain them for preparation of the amended return.

Willfulness may be inferred from the fact that a taxpayer gives false or incomplete information to his return preparer. But Mr. Meese candidly disclosed the securities transactions to Mr. McKean, prior to his preparation of the return. In addition, he solicited and followed Mr. McKean's advice on how to file a timely return in the absence of the records that were necessary to determine his cost basis in the securities.

Finally, willfulness can sometimes be shown by conduct subsequent to the filing of an erroneous return. For example, false or misleading statements to investigators or remedial action obviously precipitated by an investigation may be used to show consciousness of guilt. Mr. Meese cooperated fully in the investigation into tax treatment of his 1985 securities transactions. He provided all tax and financial records requested, and there is no suggestion that he gave false or misleading information.

No adverse inference can logically be drawn from the fact that the amended return was filed after the Independent Counsel began his investigation or that, after receiving the Independent Counsel's request for tax returns, Mr. Meese asked his return preparer whether there is a procedure for notifying the IRS that the 1985 return would be amended. It is undisputed that the decision to file the amended return was made long before the appointment of the Independent Counsel and substantial steps toward filing the amended return already had been taken.

For these reasons, the facts as we understand them simply do not permit a logical inference that Mr. Meese harbored the sort of specific intent necessary to convict him of a tax crime. If a prosecution of Mr. Meese were initiated under § 7203 or § 7206(1), it is our opinion that the government would not be able to make a prima facie showing of willfulness, and so it would be error for the trial court to deny a motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. In layman's terms, if the case were brought, the appropriate result and

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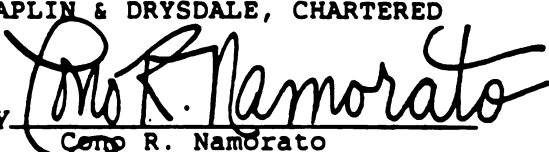
- 6 -

overwhelming likelihood would be that the judge would dismiss the charges at the end of the government's case. A fortiori, the case against Mr. Meese would not satisfy the Justice Department's threshold standard for the authorization of tax prosecutions: "evidence supporting a prima facie case and a reasonable probability of conviction." Dept. of Justice Manual 6-2.213A(1).

Sincerely,

CAPLIN & DRYSDALE, CHARTERED

By


Carmo R. Namorato


Richard E. Timbie

CRN:RET/dkh

CONO R. NAMORATO

Member of the Bar (New York and District of Columbia).

Member: American Bar Association, Section on Taxation, Committee on Civil and Criminal Tax Sanctions; Litigation Section, Chairman, Committee on Tax Litigation; Litigation Section, former Co-Chairman, Committee on Complex Criminal Litigation. Former Special Agent, Intelligence Division, Internal Revenue Service, New York, New York (1963-1968); Trial Attorney (1968-1973), Assistant Chief (1973-1975), Chief (1975-1977), Criminal Section, Tax Division, United States Department of Justice, Washington, D.C.; Deputy Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D.C. Frequent lecturer on tax subjects. Firm: Caplin & Drysdale, Chartered, Washington, D.C.

RICHARD E. TIMBIE

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June 15, 1988

JAMES E. ROCAP, III
 Attorney At Law
 2555 M Street, N.W.
 Suite 500
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Re: Grand Jury Investigation of Attorney General
Edwin Meese, III; Misc. Number 88-0033

Dear Jim:

Pursuant to your request, I am enclosing a summary of evidence which I believe the office of Independent Counsel either already possesses or could have possessed through the application of appropriate legal procedures:

1. INTRODUCTION OF WEDTECH TO MR. MEESE

A. Mr. Wallach was introduced to the offices of Welbilt by a mutual and long-time friend of Mr. Wallach's.

B. Mr. Wallach's effort, as reflected in his memos to Mr. Meese, were solely directed to the question of a "fair hearing". The memos speak for themselves in establishing they were reportorial in content and sometimes reflected an inexperienced view of just what might be accomplished at the White House level.

Mr. Wallach has no recollection of any calls, or any other efforts by Mr. Meese directed to Secretary Weinberger or Secretary Baldrige. It should be clear now that Mr. Wallach did not know of any plan by the officers of Welbilt to go public after receiving the initial contract. He did not undertake his activities for Welbilt in expectation of any financial compensation at that time or in the future.

A review of Mr. Wallach's Wedtech memos clearly reveals he engaged in extensive efforts in a wide range of areas on behalf of the company after accepting retention. None of these activities involved lobbying on behalf of the company with a federal agency or for government contract. His activities, as they related to problems attendant to ongoing contracts or the efforts to obtain the pontoon contracts, were clearly in the category of advisor to the company and advisor to primarily Mr. Bragg and later Mr. Jenkins.

Mr. Wallach decided to help Welbilt in the spring of 1981 with respect to the military standard engine contract matter. At the time, Welbilt was a struggling, minority-owned firm in the South Bronx. If successful in its efforts, the unemployment situation in the South Bronx would be improved. He did not request and was not promised any compensation for his efforts on Welbilt's behalf with respect to the military standard engine contract.

Mr. Wallach spoke to Mr. Meese and sent several written memoranda to him regarding the MSE contract matter because he believed it was a worthwhile project for the Reagan administration to support.

Mr. Wallach is unaware of any actions taken by Mr. Meese in response to his memoranda on the MSE contract matter other than Mr. Meese's recent statement that he requested his staff to insure that Wedtech was being treated fairly.

Mr. Wallach never offered or gave anything of value to Mr. Meese in connection with the MSE contract matter. Mr. Wallach never discussed with anyone the possibility of offering anything of value to Mr. Meese in connection with the MSE contract matter.

Mr. Wallach was first retained by Welbilt in 1983, primarily as a legal and political advisor. Mr. Meese learned of that representation sometime during that time period. Mr. Meese was not told of the details of Mr. Wallach's retainer agreement with Welbilt. Messieurs Wallach and Meese never discussed Mr. Wallach's compensation from Welbilt between 1983 and 1986. Nor was Mr. Meese informed that Mr. Wallach was granted stock from Welbilt, nor was Mr. Meese aware of the sale of that stock, nor any profits Mr. Wallach received from that sale, nor was he aware of the \$300,000.00 fee Mr. Wallach received in the fall of 1984.

The fact is, that the Wedtech criminal investigation first came to Mr. Wallach's attention in the fall of 1986. He mentioned the fact of the investigation to Mr. Meese but he never requested Mr. Meese to look into the investigation or do anything in respect to it. To his knowledge, Mr. Meese was never involved in the Wedtech criminal investigation and Mr. Meese never shared any information regarding that investigation with Mr. Wallach.

2. MEESE PARTNERS

Mr. Wallach understood in early 1985 that the Meeses had been required to sell all of their stocks and bonds and to invest their monies in some form of blind trust. On his own initiative, he suggested to the Meeses that they consider having Frank Chinn undertake the investments for them. Mr. Wallach previously had invested with Mr. Chinn with good results.

Mr. Wallach's suggestion to Mr. Meese to enter into an investment partnership was wholly unrelated to Wedtech, to the MSE contract matter, or to any other action taken in the past, or that might be taken in the future, by Mr. Meese. It was only a referral by a family friend of an investment opportunity.

Mr. Wallach never suggested or implied to Mr. Chinn that he should obtain a particular rate of return for the Meeses. He never suggested or implied to Mr. Chinn that he should treat the Meeses differently from his other clients. He never suggested that the Meeses investment was in any way related to Wedtech or to any action taken in the past, or to be taken in the future by Mr. Meese.

Mr. Wallach never discussed with any officers, employees, or directors of Wedtech the fact that the Meeses were in an investment partnership with Mr. Chinn's company ("FMII").

After referring the Meeses to Mr. Chinn, Mr. Wallach had no further discussions with Chinn about the manner or substance of the investments made for the Meeses.

In August of 1985 Mr. Wallach received a legal fee of \$150,000.00 from Mr. Rappaport or one of his companies for services rendered in connection with the Aqaba pipeline project. Mr. Wallach asked that the monies be sent directly to Mr. Chinn for investment on his behalf. The fee was never intended to be used for, or on behalf of, the Meeses. It was solely for the benefit of Mr. Wallach's investment partnership.

3. THE AQABA PIPELINE PROJECT

Mr. Wallach was contacted by Bruce Rappaport in connection with the Aqaba pipeline in May of 1985. His fee was \$150,000.00 plus expenses which was negotiated and paid in August 1985. He did not have any additional financial stake based upon the success or failure of the project or any other contingency.

Mr. Wallach occasionally discussed the project with Mr. Meese during the summer and fall of 1985. Mr. Meese knew that Mr. Wallach had been retained by Mr. Rappaport, but he did not know the financial details of the retainer agreement. Mr. Wallach never suggested or implied to Mr. Meese that he had any kind of financial stake in the project.

Other than the periodic discussions re the status of the project Mr. Wallach knows of only the following activity by Mr. Meese:

(a) Suggesting to Mr. McFarland that he review the project with Mr. Wallach and Mr. Rappaport in June of 1985 because it was a project in the national interest of the United States;

(b) Responding to a letter received from Shimon Peres in September of 1985;

(c) Having a brief conversation with Mr. Peres and Mr. Wallach at the Israeli Embassy reception in October of 1985 and;

(d) Talking to Alan Gerson about the proposal of the NSC.

Mr. Wallach does not know the degree, if any, of Mr. Meese's involvement in the reviews by Mr. Alan Gerson and Ralph Tarr of the October 1985 request from OPIC for a legal opinion.

Mr. Meese generally supported the project, but he clearly allowed the National Security Counsel staff to handle the entire matter. To Mr. Wallach's knowledge, Mr. Meese never was involved in, or interfered with, any NSC decision with respect to the project. Mr. Wallach never asked him to intervene in any NSC decision.

Mr. Wallach never discussed with Mr. Meese any matter relating to a bribe to the Labor Party or Shimon Peres in connection with the Aqaba pipeline project. Mr. Wallach's reference in the September 25, 1985, memoranda to certain project proceeds going to the labor party reflected his understanding of the Israeli government's receipt of a certain portion of the project revenue, part of which would go to the labor party. That reference was not intended to indicate any pay-off, bribe, or quid pro quo of any kind. To this day, Mr. Wallach is unaware of any pay-off or bribe of any kind in connection with the project.

4. THE MULTIPLE SCLEROSIS JOB

As a friend of the Meeses, Mr. Wallach knew that in mid-1985 Ursula Meese was looking for job. He was involved in discussions with Howard and Sondra Bender, Ursula Meese and Jeanne Bradley about job possibilities for Ursula. Mr. Wallach's involvement in these discussions was strictly in the capacity of Ursula Meese's friend. It was completely unrelated to any action taken or to be taken in the future by Mr. Meese.

Mr. Wallach never informed Mr. Meese or Mrs. Meese of the fact that the Blake Construction Company owned property leased by the Department of Justice. He never discussed the leases or the renewal with either Mr. or Mrs. Meese. To Mr. Wallach's knowledge, Mr. Meese never knew that the Benders or any of their companies owned any buildings leased by the Department of Justice.

5. GENERAL DENIAL OF IMPROPRIETY

Mr. Wallach has no direct or indirect knowledge that Mr. Meese ever engaged in any improper or illegal conduct in connection with Wedtech, the Aqaba pipeline, or otherwise.

The fee paid to Mr. Wallach was accomplished after Judge William Clark had accepted a role as leader of the delegation to Baghdad at the rate of \$500.00 per hour for himself plus expenses for his staff person, travel, et cetera.

The error in reporting the \$150,000.00 fee from Rappaport was based solely upon a series of errors committed by others which did not come to Mr. Wallach's attention until early 1987. The fact that the funds were not used for Mr. Meese's benefit is also apparent given the conclusions previously drawn by the Independent Counsel in his earlier report.

As indicated before, neither Mr. Meese, nor Mr. Wallach were privy to, or monitored, Mr. Chinn's investment procedures. The partnership was treated as a "blind trust" and apparently approved by Justice Department persons before being activated, or so Mr. Wallach believed.

Mr. Wallach, for his part, cooperated with the investigation. Immediately upon return from Geneva in March of 1987, Mr. Wallach voluntarily submitted to an informal interview and testimony before the Grand Jury. Although he had not refreshed his memory from many documents involved he chose to meet the timetable of the Independent Counsel. He complied with the multiple subpoenas served upon him. Any question as to the adequacy of his compliance should now be resolved. His solo practice was not equipped or experienced to comply with the magnitude of the requests. Indeed he had never been called upon to respond to a subpoena before. The matter was delegated to his personal attorney, Mr. McAlister and his office staff, with instructions to make available everything that was requested. As a result, every financial record he has, numerous files, and all of the calendar information in his possession have been produced and given to the Independent Counsel. This material amounts to thousands of pages and also includes computer disks, which were transcribed by special arrangement with the Independent Counsel and produced further documents which did not exist in printed form.

In addition Mr. Wallach voluntarily appeared for a six hour interview before the full staff, curtailed only upon advice of counsel as it related to standard personal and constitutional privileges pertaining to the New York Wedtech investigation. Mr. Wallach offered to testify as to any issue or subject matter, without any return commitment, had the investigation of him been consolidated within the jurisdiction of the Independent Counsel.

In all, Mr. Wallach has extended roughly thirteen hours of cooperation to the Independent Counsel's inquiry; approximately two hours with Mr. McKay in interview; approximately five hours before the Grand Jury; approximately six hours in review by the staff. In addition to the vast array of documents made available, he was also prepared to submit to questioning on all subjects conditioned upon a request which provided him with no immunity from prosecution, but did eliminate the double exposure to which he was then subject.

Further, as it related to the Rappaport matter, he voluntarily supplied to Independent Counsel all of the memoranda in his possession without objection and without raising the attorney-client privilege and/or work product privilege which were available to him at that time. It is significant to note that had Mr. Rappaport asserted the attorney-client privilege, Mr. Wallach was prepared to circumvent that particular area within the ethical bounds permitted by the New York, Washington and California Bars and to submit all known memos to Independent Counsel.

If I can be of any further assistance please do hesitate to call on me.

Very truly yours,



GEORGE G. WALKER

GW/leh

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● July 11, 1988

James E. Roca, III
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2555 M Street, N.W. Suite 500
Washington, D.C. 20037

Dear Jim:

In response to your request, I will set forth the evidence which I believe the Office of Independent Counsel could have obtained if it had been willing to take the necessary legal steps including conferring immunity on the appropriate witnesses. Several months ago I informed the office of Independent Counsel that if Frank Chinn were to testify pursuant to immunity, his testimony would exonerate the Attorney General. I have set forth below more specifically the evidence which I believe could have been obtained if the Independent Counsel had taken the appropriate steps to secure it.

Referral of Mr. Meese to Mr. Chinn

Bob Wallach approached Frank Chinn in early-Spring 1985 and asked whether Mr. Chinn would make investments on behalf of the Meeses. Mr. Chinn had never met Mr. Meese before that date.

Mr. Wallach never stated, suggested, or implied that his referral was, in any way, a payoff, bribe or gratuity of any kind, for anything that Mr. Meese had done in the past or that he might do in the future. Mr. Wallach did not mention Wedtech, the military standard engine contract, the pontoon contract, or any other Wedtech-related matter in any conversation involving this referral.

Mr. Wallach did not request, suggest or demand that Mr. Chinn obtain a particular rate of return for the Meeses. Nor did Mr. Wallach request, suggest or demand that Mr. Chinn treat the Meeses more favorably than his other clients.

Mr. Chinn agreed to accept the Meese account because of the referral from Mr. Wallach. Mr. Chinn never acted and never sought any favor from Mr. Meese.

James E. Rocap, III
July 11, 1988
Page Two

Mr. Chinn Initial Meeting with the Meeses

Mr. Chinn met with the Meeses in April or May 1985 to discuss the possibility of an investment partnership with them.

The Meeses explained that they were divesting themselves of their currently-owned stock, and wanted to invest in a "blind" arrangement whereby they would not be informed of the substance or manner of the investments.

The Meeses' only request with respect to return on investment was that the investments provide sufficient income to cover most of the anticipated college costs of their daughter Dana. They did not specify a required rate of return.

There was no discussion of Wedtech, the military standard engine contract, or any other Wedtech-related matter in connection with the Meeses' investment.

There was no suggestion or implication by Mr. Wallach that the Meeses were entering into the investment partnership in order to receive a payoff, bribe or gratuity of any kind or that the investment opportunity was in return for anything that Mr. Meese had done in the past or would do in the future.

The Formation of Meese Partners

Shortly before May 23, 1985, the Meeses sent to Mr. Chinn the stocks and bonds to be sold. Shortly thereafter, Mr. Meese told Mr. Chinn that he could not locate a small number of shares in the "Baby Bell" companies. In place of the mislaid "Baby Bell" stock, Mr. Meese sent a document titled "Transfer of Property".

Mr. Chinn sold the stocks and bonds he received from Mr. Meese. In late July 1985 he began investing the proceeds on behalf of the Meeses. Mr. Chinn held the Transfer of Property document in the expectation that he would shortly receive new stock certificates or old ones, if they could be found.

Since the partnership with the Meeses was "blind" as to the limited partners (the Meeses), Mr. Chinn never discussed with the Meeses the manner in which he made investments on their behalf or the substance of those investments. His

James E. Roca, III
July 11, 1988
Page Three

only communication with them regarding the investments were periodic requests by them for distributions. Mr. Chinn did not advise Mr. Meese of any particular investment strategy that would be used except insofar as his methods are described in their partnership agreement.

General Answers to Allegations of Impropriety

Mr. Chinn was not directed to, and never did, show any favoritism toward Meese Partners in making his investment decisions.

Mr. Chinn was not directed to, and never did, provide a minimum or required rate of return to Meese Partners.

Mr. Chinn never had any discussion with Mr. Wallach or anyone else in which it was stated, suggested or implied that Meese Partners was connected or related in any way to any action that Mr. Meese ever took as Counselor to the President or as Attorney General.

Mr. Chinn has no direct or indirect knowledge that Mr. Meese ever engaged in any improper or illegal conduct, in connection with Wedtech or otherwise.

Please contact me if you have any further questions on this subject.

Sincerely,



Cristina C. Arguedas

CCA:dr

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July 13, 1988

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James E. Rocap, III, Esq.
 Miller, Cassidy, Larroca & Lewin
 2555 M Street, N. W.
 Suite 500
 Washington, D. C. 20037

Dear Mr. Rocap:

This letter is in response to your request.

At a meeting in New York City in September, 1987, I, as counsel for Dr. R. Kent London, informed representatives of the Office of Independent Counsel James C. McKay that my client would not be able to provide any information showing that Attorney General Meese had engaged in illegal or improper conduct. No steps were, or have been, taken, through offers of a grant of immunity or otherwise, to obtain Dr. London's testimony. Indeed, Dr. London's contact with Attorney General Meese was so limited that he would have very little relevant information of any kind with respect to Mr. Meese.

If the Independent Counsel had taken the appropriate steps to immunize Dr. London and thereby obtain his testimony, I believe that he would have received no information of any kind, direct or indirect, that Mr. Meese ever was offered or received anything of value for any action taken, or to be taken in the future, by him as Counselor to the President or as Attorney General. This includes any action relating to Wedtech. Nor would he have received any information of any kind, direct or indirect, that Mr. Meese ever engaged in any improper or illegal activity, in connection with Wedtech or any other matter.

Sincerely,


 ALBERT J. KRIEGER

AJK:cg

PORTION OF THE FEBRUARY 24, 1988
SUBMISSION TO THE OFFICE OF INDEPENDENT
COUNSEL ON BEHALF OF EDWIN MEESE III
REGARDING THE REGIONAL BELL OPERATING COMPANY STOCK ISSUE

RELATING TO THE VALIDITY OF
THE "TRANSFER OF PROPERTY" DOCUMENT

THE "TRANSFER OF PROPERTY"
DOCUMENT HAD LEGAL VALIDITY

We emphasize that the key question regarding criminal culpability under Section 208(a) is Mr. Meese's "knowledge" of any "financial interest" he or his wife had in matters concerning the RBOCs. Having requested a legal document that would divest him of ownership, Mr. Meese lacked the necessary element of "knowledge" after he signed a paper drafted according to these instructions by an attorney on whom he reasonably relied. This is true whether, with hindsight, the document could have been drafted with greater care or particularity. In any event, the document had the desired legal effect.

A. An equitable interest in stock may be transferred without physical transfer of the stock certificates.

The Transfer of Property document purported to transfer to Mr. Chinn "all right, title and interest" in 119 specified shares of RBOC stock. The seven companies were named, and the number of shares held by the Meeses in each of the companies was detailed. The document incorporated an undertaking by the Meeses to provide the certificates "representing the above-listed securities as soon as they are available."

Stock certificates are "mere paper evidence of the title to stock, and not the stock itself." In re Penfield Distilling Co., 131 F.2d 694, 698 (6th Cir. 1942); Blue River Co. v. Summit County Dev. Corp., 207 F. Supp. 283, 289 (D. Colo. 1962). The Transfer of Property document accurately described the certificates as "representing the . . . securities." The "securities," and not the certificates, constitute the "actual, beneficial, participating ownership or interest in [the] corporation." Duncan v. Kelly, 435 S.W.2d 29, 32 (Mo. Ct. App. 1968); see also, e.g., Howbert v. Penrose, 38 F.2d 577, 579 (10th Cir. 1930) ("[O]wnership follows the owner, and not the certificates").

Beneficial interest in securities may be transferred without physically transferring the documents or certificates evidencing that ownership. Although the Uniform Commercial Code requires physical delivery of a stock certificate to transfer formal legal title to the shares of stock represented by the certificate (UCC § 8-309), the "broad field" of equitable rights and transfers of beneficial ownership in stock is not affected by the technical requirement for transfer of legal title. See, e.g., Crow v. Newspaper Dealer Supply, Inc., 603 F. Supp. 847, 851 (E.D. Mo. 1985); Phillips v. Zimring, 284 So.2d 233, 235 (Fla. Dist. Ct. App. 1973), cert. denied, 293 So.2d 359 (Fla. 1974). Equitable ownership in stock may be transferred without delivery of the stock certificates. Nor is the transfer of ownership on the books of the corporation necessary for an effective transfer of equitable title. See 12 Fletcher,

Cyclopedia of the Law of Private Corporations § 5489, at 398-400 (1984 rev.) Indeed, the owner of legal title may be a trustee for the equitable owner, who is then the real party in interest. See, e.g., Bookman v. R.J. Reynolds Tobacco Co., 48 A.2d 646, 665 (N.J. Ch. 1946) (quoting Cook v. Sterling Electric Co., 118 F. 45, 47 (D. Ind. Cir. Ct. 1902)); Broderick v. Alexander, 197 N.E. 291, 292 (1935).

The transfer of "all right, title and interest" to the stocks was clearly sufficient to transfer the Meeses' equitable ownership of securities to Mr. Chinn. Any language that identifies the subject matter of the transfer and manifests the intention of the owner of property to transfer is sufficient to vest ownership in the transferee. See, e.g., Nickell v. United States, 355 F.2d 73, 76 (10th Cir. 1966); Cook v. Commercial Casualty Ins. Co., 160 F.2d 490, 493-494 (4th Cir. 1947). If a transfer of this kind is supported by consideration, it qualifies as an assignment. See 6 Am. Jur. 2d Assignments § 82, at 263 (1963). If it is gratuitous, it creates a trust. Smith v. The James Irvine Foundation, 277 F. Supp. 774, 801 (C.D. Cal. 1967), aff'd, 402 F.2d 772 (9th Cir. 1968), cert. denied, 394 U.S. 1000 (1969) (written assignment sufficient to create valid transfer of stock in trust). In either case, the change of ownership is effective, provided that the intent to transfer is clear. See, e.g., McHenry Hospital v. Metropolitan Life Ins. Co., 578 F. Supp. 122, 124 (N.D. Ill. 1983); L'il Red Barn, Inc. v. Red Barn System, Inc., 322 F. Supp. 98, 106 (N.D. Ind. 1970), aff'd, 174 U.S.P.Q. 193 (7th Cir. 1972); Home for Destitute Crippled

Children v. Boomer, 31 N.E.2d 812, 820 (Ill. App. Ct. 1941); Bogert, The Law of Trusts & Trustees § 147, at 60-61 (rev. ed 2d. 1979); 1 Scott on Trusts § 23, at 191 (3d ed. 1967).

B. The executed Transfer of Property document either assigned full ownership of the stock to Mr. Chinn or created a trust for the benefit of Mr. Chinn and any prospective buyer or assignee.

Whether the Transfer of Property document is viewed as an assignment or as a trust document, the Meeses were divested of all meaningful ownership of the RBOC stock as of May 23, 1985. The most likely interpretation is that the document amounted to an assignment of ownership. The consideration for the Meeses' transfer of immediate equitable ownership and their promise to provide the certificates "as soon as they are available" was Mr. Chinn's undertaking to sell the stock transferred to him by the Meeses, manage the proceeds, and apply those proceeds -- less a fee for his services -- for the benefit of the Meeses. This is clearly sufficient consideration to create a binding assignment. See, e.g., Ehrichs v. Kearney, 730 F.2d 1170, 1174 (8th Cir.), cert. denied, 469 U.S. 930 (1984); Health Care Equalization Committee v. Iowa Medical Society, 501 F. Supp. 970, 978 (S.D. Iowa 1980).

Alternatively, the Meeses' intent irrevocably to transfer beneficial ownership of the shares to Mr. Chinn was entirely clear from the document, as well as from the Meeses' subsequent actions, even if no consideration for that transfer

can be inferred. Consequently, the document effectively established a trust giving Mr. Chinn immediate beneficial ownership, with the Meeses acting as trustees so long as the certificates or their replacements were unavailable. One of the most important indications of an intent to transfer a beneficial interest in stock is the reservation of dividends for the intended beneficiary. See, e.g., Elyachar v. Gerel Corp., 583 F. Supp. 907, 922 (S.D.N.Y. 1984). The dividends received by the Meeses between May 23, 1985, and the time when replacement certificates were secured were set aside by them for the beneficiary of that trust.

Moreover, since the certificates were in fact lost, it is not clear that the Meeses held any legal interest in the shares after the Transfer of Property document was executed. Courts have held that when a corporation fails or refuses to issue a certificate to the owner of stock, the legal title to that stock is held by the corporation in trust for the beneficial owner. See, e.g., Citizens' Savings & Trust Co. v. Illinois Cent. R.R. Co., 182 F. 607, 611 (7th Cir. 1910); 11 Fletcher, Cyclopedia of Corporations, § 5164, at 323-24 (1986 rev.). The same principle should apply when the certificates are not in existence for any other reason, including loss. While the certificates were unavailable, therefore, the RBOCs had the legal title and the Meeses had only an equitable interest in the stock. The Meeses' transfer of "all right, title and interest" to Mr. Chinn assigned to him, therefore, everything they then owned -- i.e., that equitable interest.

An assignment may transfer any part of the bundle of rights and interests that accompany stock ownership. See, e.g., Elyachar v. Gerel Corp., 583 F. Supp. 907, 921 (S.D.N.Y. 1984) (upholding stockholder's transfer of beneficial interests in stock while retaining power to control corporation). M Meese clearly intended to make Mr. Chinn the "real" owner of the shares until Mr. Chinn transferred them pursuant to his power to dispose of them in his "sole discretion." The fact that Mr. Chinn agreed to use the proceeds of a sale to benefit the Meeses (in part) and FMII (in part) did not affect his ownership of the equitable interest. See, e.g., Northwest Oil & Refining Co. v. Honolulu Oil Corp., 195 F. Supp. 281, 286 (D. Mont. 1961) (an assignment may be "limited by exceptions, reservations, conditions, or restrictions contained therein").

C. The Meeses had no legal authority or control over disposition of the stock once they signed the Transfer of Property document.

After they signed the Transfer of Property document, the Meeses could not control when or under what terms the specified stocks would be sold. Hence they no longer had the kind of "financial interest" to which Section 208(a) refers.

After May 23, 1985, Mr. Chinn was the owner of the stocks, and he could have sold them immediately, even before receiving the certificates. He could have contracted to sell what had been transferred to him or assigned that interest to a third party for a specified price. See, e.g., Crow v. Newspaper

Dealer Supply, Inc., 603 F. Supp. 847, 851-852 (E.D. Mo. 1985) (allowing equitable owner of shares of stock, without possession of certificates, to transfer ownership interest to third party). The Transfer of Property document obliged the Meeses to search for stock certificates and provide them "as soon as they are available," but this undertaking by the Meeses did not qualify Mr. Chinn's authority immediately to sell the shares "represent[ed]" thereby.

Nor was Mr. Chinn dependent on the diligence of Mr. Meese's efforts to obtain replacement certificates to complete any sale. Mr. Chinn had the right, as assignee of the shares, to seek replacement certificates himself to be issued to him directly from the corporations. See, e.g., Tilton v. Iowa Oil Co., 33 P.2d 446, 448-449 (Cal. Dist. Ct. App. 1934); 11 Fletcher Cyclopedia of Corporations § 5179, at 380 (1986 rev.); 18A Am. Jur. 2d Corporations § 519, at 432 (1985). Consequently, control over the timing of a sale lay in the hands of Mr. Chinn.

In these circumstances Mr. Meese could not have taken official actions regarding the RBOCs with "knowledge" of any financial impact to him by reason of the value of these stocks. The Transfer of Property document did not require advance notice to Mr. Meese of any sale of stocks, whether before or after receipt of the certificates. The document required only that the proceeds of any sale, made at Mr. Chinn's discretion, would be placed in the Meese Partners' account. As to this account, Mr. Meese received only undifferentiated quarterly statements showing the total assets, debts and credits of the accounts, and annual

statements forwarded to his accountant. Mr. Meese may, therefore, have known that he was still the record owner of the stocks because he received dividend checks, but he did not know who held the equitable ownership of the stocks or who would gain or lose from any sale.

We acknowledge that the Transfer of Property document could have been drafted more effectively to transfer all interest in the stock to Mr. Chinn, including the risk of loss in any interim period. But the document was an attempt, largely effective, immediately to give Mr. Chinn the attributes of ownership over the stock. After the execution of this document, Mr. Meese reasonably believed that his interest in the shares was limited to nominal title, with only the obligation to collect the dividend checks and transfer them, together with the certificates, once the latter became available.

PORTION OF THE FEBRUARY 24, 1988
SUBMISSION TO THE OFFICE OF INDEPENDENT
COUNSEL ON BEHALF OF EDWIN MEESE III
REGARDING THE REGIONAL BELL OPERATING COMPANY STOCK ISSUE

RELATING TO OTHER LEGAL DEFICIENCIES
IN MR. MCKAY'S CLAIM
THAT SECTION 208(A) "PROBABLY" WAS VIOLATED

I.

MR. MEESE TOOK NO OFFICIAL ACTION INVOLVING ANY
"PARTICULAR MATTER" IN WHICH HE HAD A "FINANCIAL INTEREST"

Section 208(a) precludes a government employee from "participat[ing] personally and substantially" in a "particular matter." The participation must be "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise." Section 208(a) clearly contemplates something more than incidental involvement. The enumeration of official actions that it covers is a clear indication that incidental involvement is insufficient. The statute's requirement that the "participation" must be "substantial" underscores this fact. As we explain in this section, Mr. Meese did not engage in such "personal and substantial participation" prior to the January 20, 1987, waiver. We also show that, in addition to Mr. Meese's clear belief that he had no financial interest in the RBOCs, he had no financial interest in the "particular matters" that were brought to his attention.

The Office of the Attorney General, including the Executive Secretariat, has reviewed all calendars, daily schedules, telephone logs, handwritten notes and correspondence/

memorandum files of that Office to determine what telephone industry matters were brought to the attention of Mr. Meese between May 23, 1985, and the present. We have been provided with a copy of the results of this search, as has the Office of the Independent Counsel. In addition, we have spoken with Department personnel who were principally involved in the RBOC matters, as well as the RBOC executives who were present at the four meetings with Attorney General Meese.

Our interviews and review of these documents establishes that three distinct RBOC-related issues were pending in the Justice Department during 1985 and 1986. First, the Department had specific obligations relating to the enforcement of the AT&T Consent Decree, including recommendations with respect to waivers requested by the RBOCs of the Decree's line-of-business restrictions. See United States v. Western Electric Co., 592 F. Supp. 846, 873-874 (D.D.C. 1984). Second, the Department was required to comment upon the efficacy of the Consent Decree and to recommend modifications, if any, of the Consent Decree to Judge Harold H. Greene in January 1987. See United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 195 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). Third, the Justice Department was asked to support certain legislation introduced in June 1986 by Senator Dole and others that would have vested jurisdiction over the Consent Decree with the Federal Communications Commission.

A. Mr. Meese Did Not Participate -- Substantially Or Otherwise -- in the Antitrust Division's Review of Waiver Requests from the RBOCs.

There is absolutely no indication that Mr. Meese had any involvement in, or took any action with respect to, specific waiver requests. Antitrust Division and OAG personnel say that the waiver process operated at the "line" level only, and that waiver requests never went beyond the Assistant Attorney General of the Antitrust Division. Hence there was no possible violation committed by Mr. Meese in connection with specific waiver requests. 1/

With respect to the waiver process in general, Mr. Meese attended four meetings with RBOC executives and other Justice Department personnel. At two of these meetings the documents indicate that the waiver process may have been discussed. 2/ Mr.

1/ Justice Department documents indicate that Mr. Meese may have been informed of Pacific Telesis' proposed acquisition of Communications Industries, Inc., and NYNEX's proposed investment in a transatlantic cable venture. The documents clearly show that he was never asked to take any action with respect to these two matters. Antitrust Division personnel confirm that Mr. Meese was never involved in either transaction.

Mr. Meese's contacts with William C. Clark in the Fall of 1985 did not constitute substantial involvement in the Communications Industries matter. Mr. Clark was merely asking that the Department decide Pacific Telesis' request, as had Mr. Latno previously. There is no indication that Mr. Meese did anything with respect to the matter. Indeed, despite Mr. Latno's and Mr. Clark's repeated requests for action in July, October and November, no action was taken by the Antitrust Division until February, 1986.

2/ Mr. Meese met with Pacific Telesis executives on July 9, 1985, with Bell Atlantic executives on December 13, 1985, with Bell South executives on January 28, 1986, and with Ameritech executives on February 4, 1986.
(Cont'd)

Meese's role in these meetings was that of a passive listener, however. He took no action whatsoever, and was not involved in any way in the Department's decision on waiver questions. The primary focus of these meetings was the anticipated Justice Department report to the District Court in January 1987. As we point out below, the Department review process that would provide the basis for the Department's position in the report was already underway, and Mr. Meese was not involved in directing or focusing that process in any way.

In 1985 and 1986 Mr. Meese received seven informational memoranda from the Antitrust Division that in whole or in part contained references to the Antitrust Division's waiver policies and certain waiver requests then pending. ^{3/} Receipt of such

We understand from the Department representatives in these meetings and the RBOC executives who attended that the principal focus at each of these meetings was the broad policy issues relating to the Consent Decree and the anticipated January 1987 Department report, rather than the waiver process. The documentary materials prepared in conjunction with the meetings indicate that the waiver process was a subject of discussion at the July 9, 1985, Pacific Telesis meeting. The materials relating to the December 13, 1985, Bell Atlantic meeting clearly show that the primary focus of that meeting was the anticipated January 1987 Department report to the Court on the efficacy of the Consent Decree, although the waiver process and the "beeper" case were referenced in the materials. There are no substantive documentary materials with respect to the January 28, 1986, Bell South meeting, although Bell South executives recall discussing only their desire to have input into the process. The only document describing the substance of the February 4, 1986, Ameritech meeting is a one-page memorandum stating that the subject of the meeting was "to discuss adverse elements of 'Modified Final Judgment' on competition" (a clear reference to the January 1987 Department report).

^{3/} On June 21, 1985, Acting AAG Rule provided a memorandum to the Attorney General regarding "the Department's role in enforcing the modification of final judgment in the AT&T case." (An executive summary of this memorandum was prepared by Acting (Cont'd)

information, however, cannot form the predicate for a Section 208 violation.

Section 208(a) applies to participation done "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise." It clearly contemplates more than passive involvement. The regulations promulgated with respect to Section 207 provide helpful guidance (5 C.F.R. § 737.5(d), emphasis added):

"Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

The Office of Government Ethics similarly believes that Mr. Meese's "participation" must be more than passive to raise a problem. According to the OGE, Mr. Meese's participation must have had a "direct and predictable effect" on the matter to

AAG Rule on June 25, 1985.) On July 8, 1985, Mr. Rule provided another memorandum to the Attorney General regarding Pacific Telesis' proposed acquisition of Communications Industries, Inc. On August 7, 1985, Acting AAG Rule provided a memorandum to the Attorney General on Bell Atlantic matters, and recommended against a meeting with Bell Atlantic at that time (advice which Mr. Meese accepted). On October 16, 1985, AAG Ginsburg provided a memorandum to the Attorney General on the Department's policy concerning enforcement of the Consent Decree. On December 13, 1985, AAG Ginsburg provided another memorandum to the Attorney General regarding Bell Atlantic matters pending before the Antitrust Division, in preparation for Mr. Meese's meeting with Bell Atlantic executives that day. On February 7, 1986, AAG Ginsburg provided an information memorandum regarding the Antitrust Division's position on the acquisition of Communications Industries, Inc. A similar memorandum on NYNEX's proposal to acquire an interest in a transatlantic cable venture was provided to the Attorney General by AAG Ginsburg on February 21, 1986. No further memoranda relating to the RBOC's was provided to the Attorney General prior to the January 20, 1987, waiver.

provide the necessary element under the statute. That requirement makes obvious sense. Were it not applicable, the Attorney General, who is ultimately responsible for every matter pending in the Justice Department, would be deemed to "participate" in all subjects considered anywhere in the Department. That is an untenable standard for a criminal statute.

B. Mr. Meese's Actions During the Preparatory Stage of the Department's January 1987 Position on the AT&T Consent Decree Did Not Amount To "Substantial Participation".

The Department of Justice was required to report to Judge Harold H. Greene in January 1987 on the line-of-business restrictions in the Consent Decree. Although the Department's position ultimately required the approval of the Attorney General (and Mr. Meese requested, and obtained, the second waiver out of an abundance of caution at that juncture), the job was primarily the Antitrust Division's. The preparatory work -- done in late 1985 and in 1986 -- was handled by Assistant Attorneys General Rule and Ginsburg and their subordinates. No decision or instruction was sought from Mr. Meese during this time, and he volunteered no action that is within the enumeration of Section 208(a).

1. Meetings With Executives of Four RBOCs Were Not
Actions Covered By Section 208(a).

At the request of four of the RBOCs, meetings were held at the Justice Department to hear presentations made on behalf of the RBOCs. The dates of the meetings and the attendees were as follows:

<u>Date</u>	<u>RBOC</u>	<u>Attendees</u>
July 9, 1985	Pacific Telesis	Attorney General Meese, Mr. Harrison, Arthur C. Latno
December 13, 1985	Bell Atlantic	Attorney General Meese, AAG Ginsburg, Mr. Rule, Mr. Harrison, Thomas E. Bolger, Robert Levetown
January 28, 1986	Bell South	Attorney General Meese, Mr. Rule, Mr. Calabresi, John Clendennin, Norman Frost
February 4, 1986	Ameritech	Attorney General Meese, AAG Ginsburg, Mr. Rule, Mr. Calabresi, William Weiss, John Connarn

The principal focus of the presentations on each occasion was the anticipated January 1987 report. ^{4/} All participants in the meetings recall, however, that the Attorney General's role in these meetings was to listen. He took no active role at the meetings, was not asked to resolve any immediate issues as a result of the meetings, and initiated no action after each meeting was over. The internal review process

^{4/} There is an indication that the waiver process may have been discussed in the first two meetings. See note 3, supra.

for the January 1987 report was underway at the Justice Department by late 1985, and there was no need or occasion for the Attorney General to intervene at that juncture.

The fact of the matter is that Mr. Meese's presence at the four meetings was merely a courtesy to the RBOCs. They had requested a meeting with the Attorney General, although their substantive arguments were actually directed to the Antitrust Division officials who were then shaping the Justice Department's policy statement. The meetings were held in the Attorney General's office, but those in attendance knew that the ultimate policy decision was still far from the Attorney General's desk. It was not until January 1987 that the Antitrust Division's recommendation came to the Attorney General. Realizing, at that time, that the matter of the lost RBOC certificates had still not been resolved, Mr. Meese then requested and received another waiver.

The Attorney General's presence at the four meetings with RBOC executives was only the "perfunctory involvement" described in 5 C.F.R. § 737.5(d) (p. 5, supra). It was, in every real sense, a form of "ceremonial" involvement at a preliminary stage of an internal review process -- a stage which did not call for the Attorney General's participation or intervention.

Nor was the review process, in its developmental stage, a "particular matter" within the meaning of Section 208(a). The work being done in 1985 and 1986 was the foundation for the January 1987 report to the court. Consequently, it came within the regulatory description of "broad technical areas and policy

issues and conceptual work done before a program has become particularized into one or more specific projects." 5 C.F.R. § 737.11(d). The regulation excludes such activity from the statutory term "particular matters."

2. Letters of Acknowledgment, Incorporating No Policy Decision and Providing No Substantive Promise or Advice, Are Not Actions Covered by Section 208(a).

During the 1985-1986 period, Mr. Meese signed six letters relating to the anticipated January 1987 report to the court. With one possible exception, the letters were drafted by the Antitrust Division for Mr. Meese's signature, and were signed by him in the form in which they were submitted to his office. ^{5/} None of the letters expressed any substantive judgment or amounted to an official determination or policy statement. All the letters could be accurately characterized as "acknowledgments" and as nothing more than assurances that the writers' expression of views would be duly considered in the routine course. Four particular letters demonstrate this fact:

^{5/} Mr. Meese responded to letters from Secretary Malcolm Baldrige on July 30, 1985, September 24, 1985, and April 16, 1986. He also responded to correspondence from William P. Clark on June 21, 1986, and spoke briefly with Mr. Clark about Mr. Clark's letter of October 1, 1985. Mr. Meese also responded to an inquiry from Phillip A. Campbell, President, Bell Atlantic Network Services, Inc., on May 1, 1986, and responded to a similar inquiry from William G. McGowan, Chairman of the Board and Chief Executive Officer, MCI Communications Corporation, on May 1, 1986. Mr. Meese responded to a letter from Peter D. Hannaford, a public relations consultant to North American Telecommunications Association, on July 10, 1985.

(a) Secretary of Commerce Malcolm Baldrige. -- On April 16, 1986, Mr. Meese signed a letter drafted by the Antitrust Division in response to Secretary Baldrige's letter of March 14, 1986. The Attorney General's letter advised Mr. Baldrige that the Justice Department had retained an expert to conduct a study in preparation for the January 1987 report, that the expert would receive information from various sources, including the Department of Commerce, and that all views would be considered in an "appropriate inter-agency process." The letter to Secretary Baldrige was plainly not a form of "decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." It merely conveyed information about an ongoing study process.

(b) President of Bell Atlantic Philip A. Campbell and Chairman of MCI Communications Corp. William G. McGowan. -- On May 1, 1986, Mr. Meese signed virtually identical letters that the Antitrust Division had drafted for him in response to Mr. Campbell's and Mr. McGowan's letters. The Attorney General's letters stated only that Mr. Campbell's and Mr. McGowan's letters were referred to the Antitrust Division and that they would be given "careful consideration." The signing of these letters was plainly not the kind of action covered by Section 208(a).

(c) Former National Security Adviser William P. Clark. -- On June 21, 1986, Mr. Meese signed a letter, apparently drafted in the Office of the Attorney General, responding to a letter of March 31, 1986, from Mr. Clark. No substantive policy of the Justice Department was described or promised in the

letter. Mr. Clark was told only that his letter had been referred to the Antitrust Division. Dispatch of this letter, as well, could not have amounted to a violation of Section 208(a).

3. Receipt of Memoranda Reporting on the Antitrust Division's Position On the Implementation of the Consent Decree Are Not Actions Covered by Section 208(a).

On June 21, 1985, and on October 16, 1985, Mr. Meese received informational memoranda from Assistant Attorneys General Rule and Ginsburg, respectively, concerning the Justice Department's policy direction on the Consent Decree. He also received brief informational memoranda on August 7, 1985, and on December 13, 1985, from AAG Ginsburg in preparation for a meeting with Bell Atlantic executives. ^{6/} None of the memoranda requested the Attorney General's action. Insofar as they related to the anticipated January 1987 report, all were informational, merely advising Mr. Meese of the upcoming need to prepare for the report. To our knowledge he received no reports during 1986, when the review process leading up to the January 1987 report was underway.

Receipt of informational reports is not an act covered by Section 208(a). Indeed, the previously cited regulation relating to Section 207 specifically excludes participation that

^{6/} Three other memoranda received by the Attorney General's office related to particular RBOC transactions. On July 8, 1985, and on February 7, 1986, the Antitrust Division reported on Pacific Telesis' acquisition of Communications Industry, Inc. On February 21, 1986, AAG Ginsburg reported on NYNEX's proposal to acquire an interest in a transatlantic cable venture.

involves only "official responsibility" or "knowledge." Had Mr. Meese been disqualified from RBOC matters, it would not have violated such a disqualification for him to receive informational memoranda of the kind sent by Acting AAG Rule or by AAG Ginsburg. Hence, receipt of these reports by Mr. Meese cannot be the basis of a prosecution under Section 208(a).

C. Mr. Meese's Routine Approval of the Justice Department's Position on the Dole Bill Was Not Covered by Section 208(a).

The only other matter in which Mr. Meese participated was the Antitrust Division's support of the Dole bill introduced in June 1986. There are no internal Department of Justice documents showing the degree of Mr. Meese's personal involvement in this matter. He recalls, however, that he did not personally participate in this matter except for routinely approving the recommendation of the Antitrust Division. Contemporaneous reports support this conclusion.

The Department's position on the legislation does not qualify as a "particular matter" within the meaning of Section 208(a). Indeed, the 1982 waiver given to Mr. Meese stated the view of the Counsel to the President "as well as that of the Office of Government Ethics, that discussions and decisions relating to legislative proposals for restructuring the telecommunications industry do not constitute 'particular matters' within the meaning of the statute." We have found no

judicial decision that extends "particular matter" to include support of legislation.

In any event, the 1982 waiver fully authorized Mr. Meese to act in connection with telephone industry-related legislation. See pp. 16-19, infra.

D. Mr. Meese's Limited Remaining Interest in the RBOC's Did Not Constitute a "Financial Interest" in any of the "Matters" Brought to His Attention.

Mr. Meese did not in fact believe that he had a financial interest in the RBOCs. That should end the need for further inquiry. But even if he did know that he owned an interest in the RBOCs, it does not necessarily mean that he had a "financial interest" within the meaning of the statute.

Section 208(a) was amended in 1962 to clarify that a "financial interest" in a "particular matter," rather than an undefined interest in a company, ^{7/} is required for a violation. Consequently, this element of a Section 208 violation would not be satisfied if the Meeses merely retained some "financial interest" in the RBOCs after May 23, 1985. To violate Section 208(a), Mr. Meese must have engaged in one of the enumerated statutory official actions with respect to a "particular matter" affecting that "financial interest."

A financial interest in a particular matter exists under Section 208(a) where "there is a real possibility of gain or loss

^{7/} See OGE Opinion 84X6 (May 1, 1984) (government employee's spouse does not have a "financial interest" in a contract even though she is a salaried employee of the government contractor).

as a result of developments in or resolution of a matter." United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986), cert. denied, 108 S.Ct. 68 (1987). The possibility of benefit or detriment must be "real, as opposed to [] speculative." Id. See also Office of Government Ethics Advisory Opinion, 83 OGE 1 (January 7, 1983). For a long period of time, the Office of Legal Counsel has articulated the test as whether the outcome of the particular matter "might have a direct and predictable effect" on the financial interest attributable to the government employee. See OLC Memorandum Opinion 79-38, at 238 (May 29, 1979); OLC Memorandum Opinion 78-37, at 155 (June 29, 1978). In the case at hand, the Office of Government Ethics has posed the question as follows:

[W]hether any participation by the Attorney General in any matters might have had a direct and predictable effect on an interest attributable to him, notwithstanding that all other firms similarly situated would be affected in a like manner.

With respect to the matters that were brought to Mr. Meese's attention, it cannot fairly be stated that he had a financial interest in any of them. For example, even if Mr. Meese had personally participated in a substantive manner in the preliminary stages of the January 1987 report to the court, it would be tenuous, at best, to assert that these acts then knowingly affected a real "financial interest" of his. Having signed away all "right, title and interest" in the RBOC stock in May 1985 and having promised to search for and provide the stock certificates (or their replacements), Mr. Meese could hardly have expected in late 1985 and in 1986 that a January 1987 report to

Judge Greene would affect him financially. The replacement certificates would, in the ordinary course, have been issued well before the Justice Department's filing. Only in the highly improbable event that Mr. Meese deliberately delayed the issuance and receipt of the replacement RBOC stock certificates until after January 1987 could he have anticipated that participation in the 1985-1986 process leading to the Justice Department report could have a direct and predictable effect on his own "financial interest." Even then, the Transfer of Property document permitted Mr. Chinn either to sell the shares before the receipt of the certificates or to seek replacement certificates in his own right. Hence nothing Mr. Meese could have done would have resulted in any "predictable" effect on his personal finances.

With respect to the Department's position on Senator Dole's proposed legislation, taken in June 1986, it is similarly clear that Mr. Meese's routine approval did not have a "direct and predictable effect" on his limited "financial interest." As of June 1986, Mr. Meese had requested the forms for substitute stock certificates. He had signed the affidavits required for new certificates in March and May of that year. He would surely have anticipated, as of June, that even the nominal ownership he held in the RBOCs would soon be terminated. Hence, he could not have believed that his personal interest would be served by approval of the Antitrust Division's position on proposed legislation. The principal effect of the Dole bill on the RBOCs could only be felt after the bill became law. That was surely a

distant prospect -- far beyond the time that even nominal ownership of the stock would remain with the Meeses.

II.

THE WAIVER ISSUED IN 1982 APPLIED TO MR. MEESE'S ACTIONS AS ATTORNEY GENERAL

Section 208(b) directs that the restrictions of Section 208(a) "shall not apply" if the government official or employee obtains in advance "a written determination" that the employee's financial interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from him. On July 26, 1982, the Counsel to the President granted a waiver to Mr. Meese as to his participation in "meetings to discuss the Administration's policy and strategy for legislatively restructuring the telecommunications industry or in decisions necessary to implement these policy and strategy recommendations." That waiver was never withdrawn or repealed, and it therefore overrode restrictions that Section 208(a) might otherwise impose on Mr. Meese with respect to his participation in telecommunications industry matters in 1985 and 1986.

A. A Waiver Under Section 208(b) Need Not Be Obtained For Each "Particular Matter."

The Office of Legal Counsel has ruled that a Section 208(b) waiver is not necessary for each "particular matter" that comes before a government official or employee. In an Opinion dated June 29, 1978 (OLC Memorandum Opinion 78-37, at 156 n.5), the Office of Legal Counsel said:

Although by its literal terms § 208(b)(1) would appear to require the appointing official to issue a separate exemption for each particular matter in which a given financial interest may arise, we have consistently taken the position that a blanket exemption covering a given financial interest may be issued in appropriate circumstances if the appointing official concludes that the financial interest will not be so substantial as to affect the integrity of the employee's services in whatever context it arises.

The basis for the 1982 waiver -- i.e., that the size of the Meeses' "financial interest" in AT&T was too minute to affect his official judgment -- plainly applies to multiple contexts. Hence, the 1982 waiver was a "blanket exemption covering a given financial interest" that applied to Mr. Meese so long as he remained in government service.

B. The 1982 Waiver Covered the RBOC Stock Obtained Thereafter Because That Stock Was the Equivalent of the AT&T Stock That Had Been the Subject of the 1982 Waiver.

The fact that the 1982 waiver related to the Meeses' financial interest in AT&T and not in the RBOCs enumerated in the May 1985 Transfer of Property does not undermine the effectiveness of the waiver. After the Consent Decree, the Meeses received shares of RBOC stock on the basis of the AT&T stock that they had held prior to the Consent Decree. Their "financial interest" did not change in any material way. The stock that was the subject of the 1982 waiver was substantively equivalent to the stock owned after the Consent Decree. Moreover, the dollar value of the Meeses' RBOC stock that is at issue here was substantially the same as the dollar value of the

AT&T stocks and bonds that were the subject of the 1982 waiver. The 1982 securities were valued at "approximately \$12,000." As of January 1987, RBOC stock that had not been sold (plus stock dividends declared in 1985 and 1986) had a value of less than \$14,000. Given these facts, the 1982 waiver governed the 1985 and 1986 conduct of Mr. Meese. It established the legal insignificance of a financial interest that was qualitatively identical and quantitatively equivalent to the Meeses' 1982 financial interest.

C. The 1982 Waiver Covered Non-Legislative Matters.

When the 1982 waiver was obtained, its principal focus was legislative activity. The question at that time was whether Mr. Meese could permissibly participate in strategy meetings directed at "legislatively restructuring the telecommunications industry."

But the waiver was not limited to legislative activity. By its terms, it applied as well to "decisions necessary to implement these policy and strategy recommendations." The word "decisions" was not limited to legislative efforts; its literal reach includes "decisions" of the Department of Justice implementing the Executive Branch's "policy" in the telecommunications field.

To be sure, the 1982 waiver was not issued to an Attorney General. In 1985 and 1986, Mr. Meese held a different position, with different responsibilities, than he held in 1982. But the 1982 conclusion that ownership of approximately

\$12,000 worth of stock in AT&T was too miniscule to prejudice Mr. Meese's judgment on "policy decisions" regarding telecommunications applied with equal vigor to his 1985 and 1986 judgments on "policy decisions" involving the same industry. Indeed, that same judgment was made again in January 1987, when for a second time it was determined that the value of the Meeses' telephone holdings was not so substantial as to affect the integrity of Mr. Meese's public service. Of necessity, Mr. Meese's limited actions in the interim period -- when he believed he had divested himself of the stocks -- did not violate Section 208(a).

PORTIONS OF THE FEBRUARY 29, 1988
SUBMISSION TO THE OFFICE OF
INDEPENDENT COUNSEL ON BEHALF OF EDWIN MEESE III
REGARDING THE AQABA PIPELINE PROJECT ISSUE

I.

THE GOVERNMENTAL ASSURANCE OBTAINED IN
EXCHANGE FOR THE ALLEGED ILLEGAL PROMISE WAS
NOT THE COMMERCIAL FAVORITISM CONTEMPLATED BY THE FCPA

The FCPA was enacted to deter the widespread use of overseas payments "usually designed to obtain business, to procure favors that will ensure the firm's position in that country's market, or to facilitate the conduct of normal governmental business, such as procuring customs permits, licenses, or health clearances." Unlawful Corporate Payments Act of 1977, Hearings on H.R. 3815 and H.R. 1602 Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. at 29 (1977) (hereinafter cited as "Hearings on Unlawful Corporate Payments"). Such illegal payments to secure corporate sales abroad, Congress believed, were allowing foreign government contracts and other foreign business to be purchased by illegal bribes rather than awarded through market competition. See, e.g., Foreign and Corrupt Bribes, Hearings on S. 3133 Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2nd Sess. at 91 (1976) (hereinafter cited as "Hearings on Foreign and Corporate Bribes") (Statement of William E. Simon); A Resolution to Protect the Ability of the United States to Trade Abroad, S. Rep. No. 94-444, 94th Cong., 1st Sess. at 3 (1975).

Under the FCPA, licenses, authorizations, contracts, and permits were no longer to be purchased by American concerns through illegal bribes or other forms of covert payment.

Consistent with these goals, Congress included in the FCPA the requirement that is critical here -- the alleged promise or payment must have been made "in order to assist [the] domestic concern in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. § 78dd-2(a). As the Congressional reports uniformly explain this language, the promised payment to a foreign official or party leader "must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client." Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Acts of 1977, S. Rep. No. 114, 95th Cong. 1st Sess. at 10 (1977) (hereinafter cited as "S. Rep. No. 95-114"); see also Corrupt Overseas Payments By U.S. Business Enterprises, S. Rep. No. 1031, 94th Cong. 2d Sess. at 7 (1976) (hereinafter cited as "S. Rep. No. 94-1031"); Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 640, 95th Cong., 1st Sess. at 8 (1977) (hereinafter cited as "H.R. Rep. No. 95-640"). ^{1/} As this language makes clear, "[t]he FCPA does not infringe on the right of a corporation to advertise or expend money with regard

^{1/} While these reports also include among the proscribed purposes payments made "to obtain preferential legislation or a favorable regulation," S. Rep. No. 95-114 at 10; see also S. Rep. No. 94-1031 at 7; H.R. Rep. No. 95-640 at 8, these broader forms of illegal business favoritism were eliminated from the statute's coverage when Congress narrowed the Act's language to the "obtaining or retaining business" formulation.

to political elections, except that they may not be made to partisan groups in order to secure business advantages from that group." Note, Corruption and The Foreign Corrupt Practices Act of 1977, 13 J.L. Reform 158, 180 (1979) (hereinafter cited as "Corruption and The FCPA").

This case involves a reported promise to pay a foreign political party. But the alleged payment was designed not to secure a business license or a purchase contract or some other commercial favor or advantage. It was allegedly exchanged for a governmental promise not to bomb a facility to be built in a neighboring country. Congress surely did not intend to make it a crime under the FCPA to pay for a country's assurance that it will not cross its borders and engage in international aggression. A payment or a promise to pay in exchange for a promise not to cross a border and attack is simply not within the contemplation of payment promised "in order to assist . . . in obtaining or retaining business." 15 U.S.C. § 78dd-2(a).

To be sure, there were commercial reasons motivating Mr. Rappaport and those who were seeking to construct the pipeline, and Mr. Wallach was serving as an attorney for Mr. Rappaport. But it would be bizarre to subject to the reach of the FCPA a foreign country's ultimate foreign-relations judgment -- i.e., whether to engage in aggression against a neighboring country. The allegation that peace was purchased by a promised payment from an individual who had a commercial interest in the maintenance of peace does not alter the fact that, unlike the grant of a business permit or the awarding of a contract, the

governmental decision being probed is not a commercial one. Such a decision involves neither a "misuse" of an official position nor an attempt "to wrongfully direct business" to anyone.

S. Rep. No. 95-114 at 10. The fact that commercial interests may be affected by the existence or absence of such aggression cannot transform it into a decision made "in order to assist . . . in obtaining or retaining business."

Assume, for example, that it was alleged that an American business concern paid Iranian authorities to obtain assurances that Iran would not hereafter bomb tankers in the Persian Gulf. Assume further that the immediate motivation for the payment was commercial. By a literal reading of the words, the payment could be said to have been made "in order to assist . . . in obtaining or retaining business." But it would be nonsense to ascribe to Congress the intent to have such payments investigated under the FCPA. The actions being carried out by the foreign government in such a hypothetical case relate to the exercise of a nation's foreign policy prerogatives, not to commercial favoritism.

Or assume, to consider a hypothetical made relevant by today's headlines, that an Israeli political party were promised future benefits if it supported a moderate response to Palestinian demonstrations or if it agreed to give a portion of the West Bank to Jordanian rule. Even if there were a commercial motive behind the payment -- e.g., if a supplier of products sold by Arab merchants in the West Bank provided the funds because the rioting was harming his pecuniary interests -- the promise would

not be the kind of commercial bribe that Congress contemplated in the FCPA. The FCPA was not intended to give oversight over foreign relations to United States Attorneys or to the Department of Justice.

Indeed, Congress made clear its intention not to authorize intrusive investigations into the internal affairs of foreign governments by deliberately eliminating from the FCPA a provision that would have covered payments designed to influence laws or regulations. A version of the FCPA passed by the Senate covered promises or payments that would "assist such concern in . . . influencing legislation or regulations of that government or instrumentality." S. 305, 95th Cong., 1st Sess. (1977); see also S. Rep. No. 95-114 at 17 (section-by-section analysis). In conference, Congress eliminated that provision in favor of the narrower standard now contained in 15 U.S.C. § 78dd-2(a). Foreign Corrupt Practices Conference Report, H.R. Rep. No. 831, 95th Cong., 1st Sess. at 11-12 (1977) (hereinafter cited as "H.R. Rep. No. 95-831"). The limited scope of the resulting "obtaining business" standard has been noted by commentators, since "a significant number of questionable foreign payments may be outside the Act because of this language." Note, The Deductibility of Questionable Foreign Payments, 87 Yale L.J. 1091, 1092 n.3 (1978); see also Corruption and The FCPA at 182 ("Incredibly, this section fails to encompass a traditional and widespread type of bribery: the buying of favorable regulation or legislation."). Clearly, "Congress wished to avoid any

infringement on American activities which did not relate to obtaining business." Corruption and the FCPA at 182.

What Mr. Rappaport sought from the Israeli Government, in essence, was a commitment that the Israelis would not initiate armed hostilities against a neighboring nation. Not only is this not the type of business favoritism the FCPA was designed to address, but it is clear that the assurances sought were considered by the Israeli government to be important foreign-policy goals which served Israel's paramount national interest in encouraging peace in the region. Those goals were apparently shared by this country's National Security Council staff, which believed not only that the project was a valuable endeavor to reduce tensions in the region but that it was desirable to obtain the nonaggression commitment from Israel. The fact that certain individuals would also benefit financially from such a foreign policy position does not transform the object of the alleged payment into a commercial transaction subject to scrutiny under the FCPA.

Moreover, it wholly distorts the facts to suggest that the purpose of the alleged promise or payment was to assist Mr. Wallach "in obtaining or retaining business." If the prosecution proceeds on the theory that Mr. Wallach is the "domestic concern" to which the FCPA's provisions relate, the government will have to prove that the promised payment was intended to "assist" Mr. Wallach. But it would be nonsensical to assert that the alleged promise was made in order to assist Mr. Wallach. If there was, indeed, a payment that was promised, it was designed to enable

the pipeline project to proceed, in the interests of Iraq, Jordan and Israel, as well as in the interests of a Swiss citizen and a foreign subsidiary of Bechtel. Its purpose was not to insure that Mr. Wallach would receive an attorney's fee.

Finally, in determining whether the "obtaining or retaining business" element of an FCPA violation has been satisfied, the Independent Counsel is obliged to follow Justice Department policies and standards. See 28 U.S.C. § 594(f). We know of no case in which the Department of Justice has initiated a prosecution, or even conducted a serious investigation under the FCPA, of a payment allegedly made to influence a foreign policy position of a foreign government.

Justice Department prosecutions have consistently targeted payments made for such obvious business purposes as "renewal of a stamp distribution agreement between [the defendant] and the Government of the Cook Islands," ^{2/} obtaining "a contract awarding the construction of [an] aero-medical facility" from the Government of Nigeria, ^{3/} and obtaining and retaining "contracts for the sale . . . of turbine compression systems" to Pemex, the Mexican government oil company. ^{4/} The

^{2/} United States v. Kenny International Corp., Crim. No. 79-372 (D.D.C. Aug. 2, 1979) (Offer of Proof).

^{3/} United States v. Carpenter, Crim. No. 85-353 (D.N.J. Oct. 2, 1985) (Offer of Proof).

^{4/} United States v. C.E. Miller Corp., No. CR 82-788 (C.D. Cal. Sept. 16, 1982) (Offer of Proof); United States v. Ruston Gas Turbines, Inc., Crim. No. H-82-207 (S.D. Tex. Sept. 22, 1982) (Information); see also United States v. Applied Process Products Overseas, Inc., Crim. No. 83-0004 (D.D.C. Jan. 5, 1983) (Information) (separate case involving attempts to obtain and (Cont'd)

Department's civil suits, similarly, have been limited to enjoining actions such as schemes to make payments in order to obtain a "contract for the sale and installation of radiation and fire-stop penetration seals" for a nuclear power plant run by the Mexican government ^{5/} and to obtain an "oil drilling concession . . . from the government of Qatar." ^{6/}

A 1983 report compiled by the Justice Department ^{7/} assessing filed cases and all its investigations under the FCPA, both open and closed, establishes that virtually all of the investigated payments and promises involved business purposes in the narrowest sense -- i.e., contracts, licenses and authorizations. That report sets forth the "official record of the Department of Justice's enforcement effort and experience" under the FCPA. It includes summaries of 83 closed investigations. As the chart on page 10 indicates, none of the described purposes was remotely similar to the non-aggression

retain "contracts for compression related equipment and spare parts" from Pemex).

^{5/} United States v. Silicon Contractors, Inc., Civil Action No. 85-2837 (E.D. La. June 27, 1985) (Notice of Plea Agreement) (civil settlement of civil and criminal suits).

^{6/} United States v. Carver, Civil Action No. 79-1768 (S.D. Fla. May 1, 1979) (Complaint for Permanent Injunction); see also SEC v. Ashland Oil, Inc., Civil Action No. 86-1904 (D.D.C. July 8, 1986) (Complaint for Permanent Injunction) (payments to obtain and retain "business with the government of Oman and its instrumentalities," specifically crude oil contracts).

^{7/} See Remarks of Roger M. Olsen, Special Counsel to the Associate Attorney General, United States Department of Justice, Before the Section of International Law and Practice of the American Bar Association, Aug. 2, 1983, printed at 1 Foreign Corrupt Practices Act Reporter 179 (hereinafter, "Olsen Report").

objective allegedly sought here. Virtually all were for "favorable business treatment" in the conventional sense -- i.e., a lucrative sales or construction contract, purchase commitment, or customs concession.

In the only investigation involving a purpose approaching the allegations here -- a payment allegedly made to obtain the release of two company employees being detained in a Middle Eastern prison -- the Department declined further investigation on the ground that, even if the allegations were confirmed, any prosecution would almost certainly be unsuccessful. Investigation No. 72, Olsen Report at 200. Another investigation involving the issuance of consular letters to individuals to enable them to purchase firearms in the United States was closed because it "presented serious questions as to the applicability of the FCPA." Investigation No. 2, Olsen Report at 191. While the precise basis of this conclusion was not specified, a likely explanation is that the issuance of consular letters in exchange for "payments from a U.S. gun dealer" was not considered to be the type of commercial purpose that comes within the FCPA. An attempt to obtain firearm permits is, we submit, more arguably within the FCPA than the issuance of a promise not to bomb a pipeline in a neighboring country.

Under the standards heretofore applied by the Justice Department, a case involving no Israeli contract, no license, no tax, no customs duties, and no "favorable business treatment" of any form, is simply not a case which falls within the FCPA's scope.

Foreign Corrupt Practices Act Investigations
Closed By The Department of Justice
Through August of 1983

<u>Investigation</u>	<u>Purpose of Alleged Payment</u>	<u>Investigation</u>	<u>Purpose of Alleged Payment</u>
1.	Price control concessions	43.	Not described
2.	Issuance of consular letters	44.	Not described
3.	\$150 million contract	45.	Preferential treatment at harbours
4.	\$6 million employment contract	46.	Multi-million dollar construction contract
5.	Military purchase contract	47.	Favorable import treatment
6.	Hunting licenses	48.	Construction contracts
7.	Illegal rebating	49.	Not described
8.	Mineral mining rights	50.	Procurement contracts
9.	Immunity from prosecution	51.	Contracts
10.	Not described	52.	Not described
11.	Not described	53.	Not described
12.	Not described	54.	Not described
13.	Rice contracts	55.	Not described
14.	Not described	56.	Not described
15.	Import licenses	57.	Contract dispute
16.	Customs fraud	58.	Commodity purchases
17.	Favorable forfeiture proceeding	59.	Drilling permits
18.	Favorable customs treatment	60.	Artificial price inflation
19.	Jet fuel contract	61.	Medical facility contract
20.	\$18 million road-building equipment contract	62.	Preferential shipping privileges
21.	Military store sales	63.	Not described
22.	Oil contract	64.	Transfer of bank funds
23.	World Bank contract	65.	Sales to government
24.	Not described	66.	Not described
25.	Construction contract	67.	Not described
26.	Hotel construction contract	68.	Not described
27.	Oil purchase from government	69.	Real estate transactions
28.	Transport illegal immigrants to U.S.	70.	Sale of equipment
29.	Import permits	71.	Sale of equipment
30.	Sales-activity concessions	72.	Release of employees
31.	Not described	73.	Sale of military equipment
32.	Not described	74.	Sale of major industrial property
33.	Low interest loans	75.	Government contracts
34.	Not described	76.	Not described
35.	Favorable import treatment	77.	Contract
36.	Construction contract	78.	Computer contract
37.	Contract	79.	Not described
38.	Favorable conclusion of tax audit	80.	Government influence of election
39.	Contract	81.	\$800,000 contract
40.	Aircraft sales	82.	Not described
41.	Transfer funds out of country	83.	Not described
42.	Contracts		

II.

THE ALLEGED CORRUPT PROMISE WAS
NOT WITHIN THE FCPA BECAUSE IT WAS MADE
BY AND ON BEHALF OF A FOREIGN CITIZEN

It is plain from the second Wallach memorandum of September 25 that it was "B.R." -- i.e., Bruce Rappaport -- who made the arrangements described in the paragraph that assertedly contains the language describing a foreign payment. As the two memoranda of September 25 make clear, the Israeli commitment not to bomb -- which had been received as early as February 1985 -- was attributable to Rappaport's "ability" to influence the Israeli government. The Israeli assurance resulted from conversations between Mr. Rappaport and Prime Minister Peres, and any promise of an unlawful payment would have been made during those discussions.

A. The Law Does Not Reach Promises by and for the
Benefit of Foreigners.

Even if the purpose of the alleged promise to the Labor Party in this transaction were covered by the FCPA, it was a promise made by and for the benefit of Bruce Rappaport, who is indisputably not a citizen of the United States and is reported to be a citizen of Switzerland. The FCPA is totally inapplicable to such a case.

It is clear from the legislative history of the FCPA that Congress was aiming only at "bribery of foreign officials by U.S. corporations," and not at foreigners' acts of bribery that

are merely known to American citizens. S. Rep. No. 94-1031 at 3. Under the statute, it is "domestic" concerns and their agents whose behavior is regulated. A "domestic concern" is defined as (1) a United States "citizen, national or resident," and (2) a corporation or other business organization "which has its principal place of business in the United States, or which is organized under the laws of a State" or territory of the United States. 15 U.S.C. § 78dd-2(d)(1). Moreover, an agent of a domestic concern may be prosecuted only if that agent is a "United States citizen, national or resident or is otherwise subject to the jurisdiction of the United States." 15 U.S.C. § 78dd-2(b)(1)(B)(3). This limitation to U.S.-based entities and nationals was essential to justify the exercise of extraterritorial criminal jurisdiction over conduct which Congress recognized would often occur almost entirely on foreign soil. See, e.g., H.R. Rep. No. 95-831 at 14; S. Rep. No. 94-1031 at 10 ("[A] nation may adopt and enforce laws covering foreign conduct of its own nationals and foreign conduct which has significant effects within that nation.").

Congress made clear, at the same time, that the FCPA would "not permit prosecution of a foreign national who paid a bribe overseas acting entirely on his own initiative," nor could a U.S. concern be held responsible for such payments. H.R. Rep. No. 95-640 at 8; H.R. Rep. No. 94-1031 at 7. Although such a payment may well be corrupt, the FCPA does not and could not

"reach all corrupt overseas payments." E.g., S. Rep. No. 95-114 at 11.

This case involves a foreign national acting for his own interest as a partner in the pipeline project. If the language in the Wallach memorandum is given its most incriminating possible construction, Mr. Rappaport obtained the non-aggression assurance from Prime Minister Peres by promising a large future payment to the Labor Party. If so, the promise was made by a foreign national, acting "entirely on his own initiative," H.R. Rep. No. 95-640 at 8, seeking to advance his own financial interest in the pipeline project. Such conduct is wholly outside the FCPA, and even if it had come to the attention of the Attorney General, he was without authority to interfere with it.

B. Mere Partnership with an American Corporation Does Not Bring a Foreign Citizen Within the FCPA.

Rappaport's partnership with a foreign subsidiary of Bechtel as a joint venturer in the pipeline project does not create jurisdiction under the FCPA. Indeed, Congress deliberately excluded foreign subsidiaries of American companies from the reach of the FCPA because of "the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill." H.R. Rep. No. 95-831 at 14; see also 123 Cong. Rec. 38778 ("The bill also recognizes the enforcement problems which are inherent in trying to extend the

reach of this legislation to foreign subsidiaries of U.S. corporations and consequently foreign subsidiaries have not been included within the ambit of the bill."). Only if an American company uses its foreign subsidiary as a conduit for a prohibited payment initiating with the parent is the FCPA applicable.

The mere fact that Bechtel's foreign subsidiary was engaged in a joint venture with a foreigner suspected of making a corrupt payment does not establish that such a conduit existed. To charge the parent company as a "domestic concern" liable for Mr. Rappaport's payment under the FCPA, it would have to be proved that the company made or authorized a payment "while having reason to know that all or a portion of such money" would be promised by Mr. Rappaport to a foreign political party, 15 U.S.C. § 78dd-2(a)(3). As the legislative history makes clear, Bechtel must not only have provided or authorized money to Mr. Rappaport that would fund such a payment, but must also have "had knowledge of the bribery and either explicitly or implicitly approved the practice." H.R. Rep. No. 95-640 at 8.

[T]he bill would not cover payments by foreign nationals acting solely on behalf of foreign subsidiaries where there is no nexus with U.S. interstate commerce or the use of U.S. mails and where the issuer, reporting company, or domestic concern had no knowledge of the payment.

S. Rcp. No. 95-114 at 11; see also S. Rep. No. 94-1031 at 7; H.R. Rep. No. 95-640 at 8. See also United States v. Crawford Enterprises, Inc., Cr. No. H-82-224, at 3-4 (S.D. Tex. Jan. 9, 1984) (Order) (finding that "the offenses created by the Foreign

Corrupt Practices Act require proof of actual knowledge").

In this case, there is no suggestion that the American Bechtel parent or its foreign subsidiary knew of any secret payments to be made by Mr. Rappaport. Nor is there a scintilla of evidence that they undertook to fund such an illicit payment. If the Labor Party was going to be funded in exchange for Mr. Peres' assurances, that funding was clearly to come from Mr. Rappaport himself. Indeed, Mr. Wallach's memorandum of September 25 indicates that Mr. Rappaport was financially supporting the Labor Party in various ways.

The Department of Justice has consistently refused to prosecute FCPA cases in which there has been no payment made by an American company and no evidence of a "passthrough" of funds originating from an American company. The Olsen Report's account of 83 closed investigations conducted between 1977 and 1983 reveals a consistent Justice Department policy against prosecution of any such case. For example, a factual situation similar, in various respects, to the present one was described as follows (Investigation No. 36, Olsen Report at 195):

A European construction company and an American consultant were alleged to have made payments to an official of a Mid Eastern country in connection with the award of a construction project. Evidence of a payment to the official was not found. Even absent evidence of a payment there was a legal question regarding the applicability of the FCPA to a European corporation when no evidence of a pass through was found.

Another investigation closed by the Department on similar grounds was the following (Investigation No. 40, Olsen Report at 196):

A foreign agent in a Far Eastern country was alleged to be involved in U.S. currency violations and in making payments to politicians in the Far Eastern country in connection with aircraft sales by an American manufacturer. It was determined that no commissions were paid, or would be paid, to the agent by the American manufacturer.

See also Investigation No. 48, Olsen Report at 197

(investigations into alleged political contributions by major U.S. company in exchange for construction contract closed when "monies alleged to be the illegal payments were traceable only to the American Company's overseas agent who refused to cooperate").

The promised funds in this case, if any, were plainly to come from Rappaport himself. They did not derive from any American source. Hence the FCPA does not apply.

C. Mr. Wallach's Role in the Negotiations Does Not Bring the Alleged Promise Within the FCPA.

Nor is this basic flaw in any conceivable prosecution under the FCPA remedied by Mr. Wallach's participation. Mr. Wallach received an attorney's fee for his services on behalf of Mr. Rappaport, and he therefore had a personal financial interest in furthering the pipeline. Unlike Bechtel, Mr. Wallach knew (or at least believed) that an alleged payment had been promised. There is no indication, however, that he was an owner or partner of any kind in the pipeline. And, more importantly, there is no

basis to believe that he was the anticipated source, in whole or in part, of any payment to the Israeli Labor Party. Mr. Wallach's role as attorney for a foreign national accused of making an illegal payment does not bring the alleged payment within the FCPA.

If Mr. Wallach is viewed as the "domestic concern" to which the FCPA applies, the statute would be violated only if that "domestic concern" is the principal in the unlawful transaction -- i.e., if the illegal promise or payment is made by, or on behalf of, the "domestic concern." It is not a violation of the FCPA for an American citizen to act on behalf of a foreign national involved in a corrupt payment or promise. The corrupt payment or promise must be made by, or for the benefit of, an American business entity.

This conclusion emerges plainly from the language and purpose of the FCPA. The Act makes it unlawful for a "domestic concern" or its officer or agent to use the mails in furtherance of a payment or promise to pay to a foreign official "in order to assist such domestic concern in obtaining or retaining business." The payment must, therefore, be made on behalf of the "domestic concern," not on behalf of a foreign enterprise. It must be proved that a "domestic concern" was the principal behind a payment or promise, not that it was acting the agent of a "foreign concern." This requirement is essential for jurisdictional purposes. See, e.g., Pollack and Feldstein, "The Extraterritorial Application of the Foreign Corrupt Practices Act" at 219, printed in The Enforcement of the Foreign Corrupt

Practices Act by the Reagan Administration (ABA, August 2, 1983) ("By definition, any offense under the FCPA will have an effect in the United States . . . since payment or the offer of payment must be made on behalf of a domestic concern and since the business to be obtained or retained is for a domestic concern."). Where an "agent" is prosecuted, the Act makes clear, similarly, that it must be the "agent of [a] domestic concern," 15 U.S.C. § 78dd-2(a), not an agent of some foreign company.

The purpose of the FCPA was not to reach bribes by foreigners or foreign companies. If an Italian company happens to employ an American citizen, and that citizen uses the United States mails in furtherance of the Italian company's bribery of a French official, the "domestic concern" component of an FCPA violation is not met because the bribe is not "assisting" a "domestic concern" to obtain or retain business. Congress was not seeking to bar Italian companies from bribing French officials, even if they utilize American citizen employees to do so. And the fact that the American employee "retains" his job by participating in the bribe does not bring the bribe within the FCPA. The thrust of the FCPA is directed towards "domestic concerns," and it is they, not American agents of foreign concerns, who are the targets of the law. To read the statute otherwise is to have the tail wag the dog.

All the evidence points to Mr. Rappaport's sole responsibility in obtaining the Israeli assurances expressed in Mr. Peres' letters of February and September 1985. There is no evidence to show that Mr. Wallach, who was retained in May 1985,

acted in any capacity other than as Mr. Rappaport's attorney. As such, Mr. Wallach could not "authorize" Mr. Rappaport to do anything, and certainly could not act as the principal for Mr. Rappaport's alleged illegal promise to a foreign political party. Indeed, there is no evidence that Mr. Wallach even knew anything about the alleged promise except what was "indicated" to him by Mr. Rappaport shortly before September 25. Thus, it is clear that Mr. Wallach was not a "domestic concern" that made or authorized an "offer, payment, or promise" to the Labor Party.

Nor can Mr. Wallach be considered to have made or "authorized" any payment to Mr. Rappaport while having "reason to know" that that money would be offered to the Labor Party within the meaning of 15 U.S.C. § 78dd-2(a)(3). The "reason-to-know" provision is designed to bring within the FCPA an American principal that transmits its funds to a foreigner with knowledge that the foreigner will use "such money" for a bribe or other illegal payment. See Fedders, "The 'Reason To Know' Standard -- A Troublesome Ambiguity in the Foreign Corrupt Practices Act," 4 Middle East Executive Reports 2, 20 (1981) (this provision "covers situations where agents are used to channel payoffs to foreign officials" by "U.S. persons"). It does not, by its terms or by its purpose, reach an American agent of a foreign principal.

Mr. Wallach acted simply as Mr. Rappaport's attorney in the matter. Mr. Wallach received \$150,000 plus expenses from Mr. Rappaport, and there is no evidence that Mr. Wallach paid any money to Mr. Rappaport, for purposes of an illegal payment or

otherwise. Consequently, Mr. Wallach neither offered nor gave anything of value to Mr. Rappaport. Nor would the prospect of a future ownership interest in the pipeline make the FCPA applicable to Mr. Wallach. If the unlawful promise was made by Mr. Rappaport in February 1985 and was not illegal when made because it came from a foreign national, it did not become illegal because an American citizen assumed some ownership role after the illegal bargain was struck.

Finally, it is plain from the only published opinion applying the FCPA, United States v. McLean, 738 F.2d 655 (5th Cir. 1984), that Mr. Wallach, as an agent of the party that was responsible for the foreign payment, cannot be characterized separately as a "domestic concern" and prosecuted separately from Mr. Rappaport. The Fifth Circuit held in McLean that "in order to convict an employee under the FCPA for acts committed for the benefit of his employer, the government must first convict the employer." 738 F.2d at 660. On this account, the Court of Appeals rejected the argument that the employee may be prosecuted "in his individual capacity or as a domestic concern" without first prosecuting the employer for whose benefit the payment was intended. Such a prosecution, said the Court, would violate the Eckhardt Amendment, 15 U.S.C. § 78dd-2(b)(3), which authorizes prosecution of "any employee or agent" only after the "domestic concern is found to have violated" the Act. It prevents a prosecution that makes the employee or agent a "scapegoat" for corporate action. 738 F.2d at 659-60.

If Mr. Wallach was Mr. Rappaport's agent, he can be prosecuted only if Mr. Rappaport is successfully prosecuted, and not by characterizing him "in his individual capacity as a domestic concern." Obviously, Mr. Rappaport is a foreign national not subject to the FCPA. The policy of the Eckhardt Amendment therefore precludes any prosecution of Mr. Rappaport's agent or anyone allegedly aiding and abetting that agent.

III.

THE ALLEGED CORRUPT PROMISE WAS
NOT WITHIN THE FCPA BECAUSE IT WAS A
PROMISE TO MAKE A POLITICAL CONTRIBUTION
THAT WAS LEGAL UNDER ISRAELI LAW

The FCPA does not prohibit all payments made to foreign officials or to foreign political parties. It reaches only "bribery payments as narrowly defined." S. Rep. No. 94-1031 at 9. In the words of Senator Proxmire, the law's original sponsor, the FCPA adopted a "classic and rather limited definition of a bribe and one that would seem to me would not run afoul of any . . . definition a foreign country might have." Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Hearings on S. 305 Before the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. at 98 (1977).

Mr. Wallach's memorandum of September 25 did not say that a bribe was going to be paid. It spoke of Israel's anticipated receipt of \$65-70 million a year for ten years --

presumably out of Rappaport's share of the pipeline venture. It then specified "that a portion of those funds will go directly to labor."

A reasonable construction of these ten words is that the Labor Party will receive part of the money that Mr. Rappaport has promised to the State of Israel -- i.e., that rather than paying the full \$65-70 million each year to the Government of Israel, Mr. Rappaport will be paying a part of the money to the Labor Party. Such a payment by Mr. Rappaport could be entirely lawful under Israel's law and, if so, it would not violate the FCPA.

In enacting the FCPA Congress criminalized certain foreign payments, but it did not reach many forms of payment that were not deemed intrinsically corrupt. Payments permitted under the law of the foreign country where the payment is made, and particularly lawful political contributions, continue to be lawful. See S. Rep. No. 94-1031 at 9 (recognizing a category of "questionable" foreign payments which "are dubious in purpose but may not meet the bill's definition of an illegal bribe," including "contributions to foreign political parties"). The FCPA was intended to "bridge the situation" in which a payment that is unlawful under the foreign country's laws is "hard for those countries to prosecute because they don't have the facts." Hearings on Foreign and Corporate Bribes at 9 (remarks of Sen. Proxmire).

It was the problem of foreign political contributions that posed the greatest difficulty for Congress in justifying the FCPA's prohibition of "wrongful" foreign payments. As a number

of witnesses pointed out, "in most countries of the world corporate political contributions are not illegal." Hearings on Foreign and Corporate Bribes at 6; see also id. at 21. In contrast to bribery, which "virtually every country" prohibits under its own laws, S. Rep. No. 94-1031 at 4, legal political contributions were seen as inappropriate targets for United States legislation. The bill's sponsors responded to this concern by clarifying that such lawful political contributions were "not what we had in mind with this legislation." Hearings on Foreign and Corporate Bribes at 9; see also Protecting The Ability of The United States To Trade Abroad, Hearing Before the Senate Committee on Finance Subcommittee on International Trade, 94th Cong., 1st Sess. at 14 (remarks of Sen. Church) (stating, in regard to the predecessor bill to the FCPA, that it would make political contributions "illegal only when, under the laws of a foreign country, they are also illegal"); cf. Foreign Payments Disclosure, Hearings Before the House Committee on Interstate and Foreign Commerce Subcommittee on Consumer Protection and Finance, 94th Cong., 2nd Sess. at 115 (testimony of Theodore C. Sorenson) ("Wisely, in my view, the bill does not prohibit lawful political contributions."). As legislators and commentators agree, the FCPA would not prohibit political contributions legal under Israeli law.

The second Wallach memorandum of September 25 describes Bruce Rappaport's relations with Israeli officials. It explains that Mr. Rappaport had been financing private polls on behalf of Labor-Peres for some time and then states the following:

[B.R.] confirmed the arrangement with Peres to the effect that Israel will receive somewhere between \$65-70 million a year for ten years out of the conclusion of the project. What was also indicated to me, and which would be denied everywhere, is that a portion of those funds will go directly to labor.

Only if the money that was to go "directly to labor" amounted to a prohibited payment to a political party under 15 U.S.C. § 78dd-2(a)(2) would there be any possible basis for proceeding under the FCPA. If the payment amounted to a lawful political contribution, or was a lawful disbursement of Israeli government funds to a political party, it would fall outside the FCPA.

It need hardly be said that the words "a portion of those funds will go directly to labor" are ambiguous. The "funds" to which reference is made are plainly the "\$65-70 million a year" that Israel is to receive "out of the conclusion of the project." But, does "directly to labor" mean "directly" from Mr. Rappaport or "directly" from the Israeli government?

Israeli law provides for governmental funding of Israeli party politics, both during and between elections. See Israel's Political Parties (Financing) Law 5733 (1973) Under this spending program, in effect since 1973, each Israeli political party is "entitled to be financed for . . . its elections expenses in the election period" and "its running expenses" in between elections by funds that "shall be paid out of the Treasury." According to the Israeli press, Israel is said to be the only parliament that subsidizes "not only the parties' campaign expenses, but also their 'current' (operating)

expenses." Israeli political parties are described as receiving "hefty sums from the public kitty." Aryeh Rubinstein, "Watching the Ceiling Go Up," The Jerusalem Post (Dec. 13, 1985); see also Asher Arian, Politics in Israel: The Second Generation at 106 (Chatham House Publishers, Inc., 1985) (under the financing law, Israeli parties receive "generous payments made by the public treasury"). Obviously, a "portion" of Israel's income from the project could lawfully go to the Labor Party through official channels. 8/

If the sentence in Mr. Wallach's memorandum is interpreted to mean that Mr. Rappaport promised to give money to the Israeli government, and that he intended to give "a portion" of the funds generated by "the conclusion of the project" to the Labor Party, there is still no basis to believe that this was other than a lawful political contribution. Indeed, the juxtaposition of this paragraph with the previous one, which states that Mr. Rappaport had been financing Labor Party polls "for quite a long time," makes it likely that Mr. Wallach was told that a private contribution would be made.

Israeli law permits foreign individuals to contribute to Israeli political parties, with no limitation on the total amount. Section 8 of Israel's 1973 Political Financing law,

8/ We note from recent news reports that Prime Minister Peres explains the \$65-70 million figure as the value of discounts that Israel was to receive in purchase of oil from the pipeline. If so, it is plain that the only way "a portion" of that \$65-70 million could have "gone" to the Labor Party is by a payment from the Israeli treasury.

enacted to provide a regular source of government funding for Israel's political parties, specified that:

A party group shall not, directly or indirectly, receive any contribution from a body corporate in Israel. For the purposes of this provision, "body corporate" includes a registered partnership.

A study by the American Enterprise Institute of the effect of the 1973 Israeli law reported that the law "does not prohibit contributions by individuals, nor does it limit the amount of such contributions. Neither does the law prohibit or limit contributions from individuals, groups or corporations abroad." Boim, "The Financing of Elections," in Israel at the Polls: The Knesset Election of 1977 at 215 (Howard R. Penniman, ed.) (American Enterprise Institute, 1979).

In 1982, Section 8 was amended to broaden the prohibition to contributions from "a body corporate whether in Israel or abroad," thereby expanding the limitation to encompass foreign corporate contributions. Contributions from foreign individuals, however, continued to be permissible under the law, with no limitation as to amount. See Yosef Goell, "When Thieves Fall Out," The Jerusalem Post (Feb. 5, 1987) (criticizing "[l]oopholes in election funding laws that permit unlimited, personal campaign contributions and contributions from abroad").

More recently, there have been unsuccessful efforts to amend the law to set limits on individual contributions. See

Aryeh Rubinstein, "The Cat and the Cream," The Jerusalem Post (Feb. 7, 1985); Asher Wallfish, "Move to Limit Party Donations," The Jerusalem Post (Feb. 25, 1987). Proposed legislation was based on the findings of the State Comptroller in January 1987 that there had been individual political contributions in amounts as high as \$500,000. The legislation's sponsor, Amnon Rubinstein, argued to the Knesset that a businessman who contributes half a million dollars to a political party must be expecting some financial benefit from the party, and such a contribution is, therefore, equivalent to giving a "bribe." Nonetheless, the legislation was defeated. Current law allows contributions from individuals, foreign and Israeli, without limitation.

Foreign contributions have, in fact, formed an important, if hotly debated, part of the funding of Israeli political parties, to the point that one early commentator described it as "axiomatic in Israeli politics" that no election is possible without substantial assistance from "counterpart parties abroad." Emanuel Guttman, "Israel," 25 The Journal of Politics 703, 711 (1963). Funding has also traditionally been solicited and received from "personal admirers or followers of Israeli party leaders abroad." Id.; see also Paul Burstein, "Political Patronage and Party Choice Among Israeli Voters," 38 The Journal of Politics 1024, 1031 (1976) ("In Israel contributions from abroad have been used by parties to enhance

their power in ways that would be impossible without such outside resources."); Asher Arian, Politics In Israel: The Second Generation at 106. Had Mr. Rappaport indeed told Mr. Wallach that he planned a political contribution to Labor, even a substantial one, that contribution would have violated no laws relating to the funding of Israeli political parties.

The question remains, of course, whether Mr. Rappaport's promise to contribute large sums to the Labor Party on the completion of the pipeline would be viewed as a bribe under Israeli law or as a permissible political contribution. This question would be, at the very least, a thorny one under Israeli law. A recent judgment following a publicized trial held in Tel Aviv demonstrates the complexity of the issue.

State v. Einav, Tel Aviv District Court No. 85/640, was a case in which payments were made by a West Bank land speculator to a fund controlled by an Assistant Minister of Agriculture, allegedly to obtain favorable treatment for West Bank land dealers and promoters. The fund was affiliated with the Likud Party, and the defendant was charged with three counts of bribery for giving checks himself, for participating in a meeting in which land promoters were solicited for contributions, and for participating in a demand to one promoter that he make a contribution as a condition for receiving an Agriculture Department commitment. In July 1987, after a full trial, the court acquitted the defendant on the first two counts and found him guilty on the third.

The trial court in the Einav case stretched the Israeli bribery law to its outer extreme. Indeed, its construction of the bribery law went beyond even the position argued by the prosecution, holding that it is sufficient if the intent to bribe is among the purposes of the payment rather than its principal purpose. Nonetheless, the court acquitted the defendant on two of the three counts, and the conviction on the third count is now on appeal to the Israel Supreme Court. From the decision in this case, it is clear that Israeli bribery law requires stringent proof that a contribution is given as an express condition of official action, rather than as an expression of general support or in the hope of ultimate benefit.

At the very least, the Einav case demonstrates that a close question would be presented under Israeli law even if it could be proved that Bruce Rappaport had promised Prime Minister Peres that he would make substantial contributions to the Labor Party if the pipeline were not bombed. In fact, there is no evidence, even in Mr. Wallach's second memo of September 25, to show that any political contribution that Mr. Rappaport might have planned to make "out of the conclusion of the project" was a condition of favorable Israeli action, rather than an expression of Bruce Rappaport's continuing and long-time support for Labor. Such a bribe would have been neither necessary nor plausible, in light of the overwhelming economic and political benefits that would flow to Israel from supporting the pipeline project, and the stature of Mr. Peres as a well-respected Israeli leader.

Under these circumstances, it would be unfair to attribute to Mr. Wallach the intent to further a payment prohibited by Israeli law. And it would be ludicrous to proceed against the Attorney General for receiving a memo which describes a payment that would most likely be legal under Israeli law, and for failing thereafter to interfere with Mr. Wallach or with Mr. Rappaport in their efforts to implement the pipeline project.

IV.

SINCE THERE WAS NO MAILING
OR USE OF INTERSTATE COMMERCE IN
FURTHERANCE OF THE ALLEGED ILLEGAL
PROMISE, THE FCPA WAS NOT VIOLATED

The FCPA is violated only if someone "make[s] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance" of an illegal payment or promise to pay. 15 U.S.C. § 78dd-2(a). There were, however, no acts by Mr. Wallach in furtherance of the promise made to the Labor Party. Mr. Wallach's role, for which he was retained by Mr. Rappaport, was to help obtain financial guarantees from American officials and American financial institutions. Mr. Wallach apparently took various actions on this aspect of the pipeline project. He communicated with members of the National Security Council staff and with the Overseas Private Investment Corporation, seeking their support in insuring the Israeli assurances. He met with Mr. Meese and with others. He wrote letters and memos describing and seeking to promote the project. He flew to London, Geneva, and Amman to discuss the project with Mr. Rappaport, Bechtel executives, and Jordanian officials.

These were not, however, acts "in furtherance of" a corrupt promise within the meaning of the FCPA. There is no suggestion that Mr. Wallach promised or authorized a political contribution, participated in the making of such a promise, or even discussed with Mr. Rappaport whether to make such a contribution. As a consultant for the project in certain respects -- none of which involved obtaining the nonaggression assurance from Israel or any promise made for that assurance -- Mr. Wallach was scarcely in a position to take such actions. Nor is there any hint that Mr. Wallach gathered or gave to Mr. Rappaport funds to be used for such a contribution, opened any account, or had any involvement with the alleged promise, other than possibly being told of it by Mr. Rappaport.

More significantly, the alleged promise had already been made by the time Mr. Wallach was retained to work on the project. The indisputable evidence shows that Mr. Rappaport had obtained a written assurance from Prime Minister Peres long before Mr. Wallach was involved in this project. Indeed, the memorandum of September 25 reports that Mr. Rappaport "confirmed the arrangement with Peres" that had previously been made, including the fact that a portion of those funds "will go directly to labor."

Since the promise related to funds that would be provided "out of the conclusion of the project," there was no action "in furtherance" of the unlawful promise that Mr. Wallach could conceivably have taken after May 1985. This set of facts

should be contrasted with the records in cases in which the Justice Department has enforced the FCPA -- all of which have involved acts "in furtherance of" the actual unlawful payment or "in furtherance of" the promise to make such a payment.

In the series of Crawford cases, for example, it was the defendants' use of a commercial aircraft to fly from Houston, Texas, to Mexico City to submit bids which intentionally included an amount for bribes to Mexican officials that was the "use of an interstate instrumentality that form[ed] the basis for the violation of the Foreign Corrupt Practices Act charged." ^{9/} In another similar case, the use of interstate commerce alleged was "utiliz[ing] a commercial airline from Houston, Texas, to Mexico City, Mexico, for the purpose of delivering a bribe payment in the amount approximately of \$61,464.80" to a Mexican official. ^{10/}

Other "in furtherance" allegations have included use of "a Western Union international telex to order [a bank] to pay \$580,973.00" to an account set up for paying Nigerian officials, ^{11/} use of a commercial aircraft to fly from Los Angeles to Honolulu

^{9/} United States v. Ruston Gas Turbines, Inc., Crim. No. H-82-207 (S.D. Tex. Sept. 22, 1982) (Offer of Proof); see also United States v. C.E. Miller Corporation, No. CR 82-788 (C.D. Cal. Sept. 16, 1982) (Information and Offer of Proof) (the use of a commercial aircraft to travel from Los Angeles, California, to Houston, Texas, to deliver bids which included mark-up for bribes to Mexican officials "is [the] use of an interstate instrumentality which forms the basis for the violation of the Foreign Corrupt Practices Act").

^{10/} United States v. Applied Process Products Overseas, Inc., Crim. No. 83-4 (D.D.C. May 27, 1981) (Offer of Proof).

^{11/} United States v. Carpenter, Crim. No. 85-353 (D.N.J. Oct. 2, 1985) (Information).

to meet with the foreign official to "make final arrangements for the payment" of illegal voter subsidies, 12/ and use of "interstate and foreign bank processing channels" to pay an agent \$132,000. 13/

No use of interstate commerce involved here comes close to the direct involvement in the making of a foreign corrupt payment which has supported jurisdiction in past prosecutions. If the promise described in the Wallach memorandum was an illegal one, it had been made long before Attorney General Meese ever learned of it. Its implementation lay far in the future. There was no act "in furtherance of" the allegedly unlawful promise performed by Mr. Wallach or by anyone else in the United States.

V.

MR. MEESE'S MINIMAL INVOLVEMENT
DID NOT CONSTITUTE AIDING AND
ABETTING AN FCPA VIOLATION

Since Attorney General Meese was not involved in any manner in the promise allegedly made to Prime Minister Peres, he could be charged with a violation of the FCPA only under 18 U.S.C. § 2(a), which makes any person who "aids, abets, counsels, commands, induces or procures" the commission of a crime punishable as a principal. As the Supreme Court has defined aiding and abetting,

12/ United States v. Kenny International Corp., Crim. No. 79-372 (D.D.C. Aug. 2, 1979) (Offer of Proof).

13/ United States v. Silicon Contractors, Inc., Civil Action No. 85-2837 (E.D. La. June 27, 1985) (Complaint for Permanent Injunction).

In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting L. Hand, J., in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)); see also e.g., United States v. Barfield, 447 F.2d 85, 88 (5th Cir. 1971). This aiding-and-abetting test has been interpreted to require the prosecution to prove four distinct elements:

First, it is "essential that the Government demonstrate that the substantive crime has been committed." United States v. Cades, 495 F.2d 1166, 1167 (3rd Cir. 1974); see also United States v. Erb, 543 F.2d 438, 446 (2nd Cir.), cert denied 429 U.S. 981 (1976). Second, the prosecution must prove "guilty knowledge on the part of the accused." United States v. Raper, 676 F.2d 841, 849 (D.C. Cir. 1982), cert denied 465 U.S. 1037 (1984); United States v. Staten, 581 F.2d at 878, 886-87 (D.C. Cir. 1978). Third, the prosecution must establish the accused's "specific intent to facilitate the commission" of the crime. United States v. Raper, 676 F.2d at 849; United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1975); United States v. Barfield, 447 F.2d at 88. Finally, the prosecution must establish that the accused by affirmative conduct "assisted or participated in the commission of the offense." United States v. Raper, 676 F.2d at 849; United States v. Cowart, 595 F.2d 1023,

1031 (5th Cir. 1979). In short, a person accused of aiding and abetting a crime must be shown to "have consciously assisted the commission of the specific crime in some active way." United States v. Campbell, 702 F.2d 262, 265 (D.C. Cir. 1983) (quoting United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975)).

As applicable to this case, these requirements mean that the prosecutor would have to show:

- (1) that Mr. Wallach violated the FCPA;
- (2) that Mr. Meese knew that Mr. Wallach was violating the FCPA;
- (3) that Mr. Meese shared Mr. Wallach's intent to violate the FCPA; and
- (4) that Mr. Meese engaged in affirmative conduct designed to assist Mr. Wallach in violating the FCPA.

None of these elements is present here.

A. There Was No Violation of the FCPA.

For reasons outlined previously, there was no violation of the FCPA as a matter of law. Hence, the first critical element of an aiding-and-abetting allegation is entirely absent, the existence of some "guilty principal." United States v. Raper, 676 F.2d at 849. Obviously, if no violation of the FCPA was committed, there is absolutely no basis for charging anyone -- and no basis for even investigating Mr. Meese.

B. Mr. Meese Had No Knowledge That the FCPA Was Being Violated.

It is also clear, from Mr. Meese's testimony, that Mr. Meese had no knowledge that any "activity condemned by the law [was] actually occurring." United States v. Tarr, 589 F.2d 55, 59 (1st Cir. 1978). Even if it could be proved that Mr. Wallach had committed a violation of the FCPA, there would be absolutely no basis for charging Mr. Meese, who was entirely unaware of any such crime. Indeed, given the ambiguity of the sole "evidence" that was presented to him, there would have been no reason for him to have believed that a illegal payment was being contemplated.

Without proof that Mr. Meese possessed "guilty knowledge" that Mr. Wallach was engaged in a crime, United States v. Raper, 676 F.2d at 849, there would be no evidence that he was even aware of the crime with which he would be charged. A party who unknowingly takes steps that may further a crime obviously lacks the criminal culpability required to justify punishment. Courts repeatedly have held that "unknowing participation in a criminal enterprise is not sufficient under the aiding and abetting statute." United States v. Pearlstein, 576 F.2d 531, 546 (3rd Cir. 1978) (salesmen unaware of fraudulent nature of company's scheme).

To be convicted of aiding and abetting, the accused must know not only that a crime is being committed, but must intend to participate in the specific crime with which the principal is charged. Indeed, convictions have been reversed where the aider

and abettor's knowledge did not include all the elements of the principal's crime. See United States v. Tarr, 589 F.2d at 60 (reversing conviction for aiding and abetting the business of dealing in arms where defendant knew only of a single sale of arms); United States v. Cades, 495 F.2d at 1168 (reversing conviction for aiding and abetting misapplication of bank funds where defendant, who engaged in check-kiting, was unaware of bank president's intent to defraud).

As we demonstrate below, Mr. Meese had no knowledge, actual or constructive, that there was any criminal activity whatever, much less a violation of the FCPA.

1. Mr. Meese had no knowledge of a foreign corrupt payment.

(a) Actual knowledge -- Mr. Meese consistently has testified that he understood that Israel was willing to give assurances that it would not interfere with the construction of the pipeline because "it was financially beneficial to Israel for them to do this." Transcript of November 22, 1987 ("Tr.") at 40; see also Tr. at 44, 48, 63, 106. There is absolutely no evidence that Mr. Meese knew, at the time he received Mr. Wallach's September 25 memorandum, that an illegal payment to the Labor Party had been promised.

Mr. Meese testified that he did not focus on the language in the September 25 memorandum that is at issue here until the investigation itself (Tr. at 50):

- Q. Well, apart from your discussion with Mr. McFarlane about the general Israeli government financial interest in the project do you have any recollection of having a specific

discussion with Mr. McFarlane about the Labor party's financial interest in the operation?

A. No.

Q. No, you have no recollection?

A. I have no recollection and I don't really recall having focused on that until reading it in the memo there.

Q. Okay. Until reading it in the memo there today?

A. Today, yes.

As his testimony makes clear, Mr. Meese's understanding at the time he received the memos from Mr. Wallach was that the incentive for the Israeli assurances was the general financial benefit Israel would receive (Tr. at 48):

My recollection -- the only recollection I have is of -- particularly in regard to that reference to quid pro quo is the 25th of September memo, was it was the general benefit to Israel.

I have no even general recollection of the benefit to the Labor Party other than as is expressed in that other memorandum that you showed me.

I know -- I believe that there was no other discussion at all, or at least I don't remember any discussion about how the money was going to go, and to me it appeared that Israel would have had a beneficial interest coming as a part of the total transaction but exactly how all that worked I don't know.

At various points during Mr. Meese's testimony, he gave affirmative answers to certain questions that could be read, in isolation, as indicating knowledge on his part of the fact the funds would be provided to the Israeli Labor Party. In one

instance, for example, he gave an answer that appears from the transcript to be his recollection but was, in actuality, read by him substantially from a copy of that September 25 memorandum that Mr. Meese was then holding in his hand (Tr. at 40).

Clarification of the circumstances and of the actual state of Mr. Meese's knowledge is provided by Mr. Meese's Declaration dated February 17, 1988, that has been provided to the Independent Counsel. That Sworn Declaration states:

I have a general recollection of receiving the two September 25 memoranda from Bob Wallach. I do not recall reading them in their entirety, reading them in any detail, or reading them with any particular care . . . I do not have any recollection of reading the passage of the second September 25 memorandum that a portion of the money to be received by Israel "will go to labor" or that that fact would be "denied everywhere" prior to this investigation.

As I testified a number of times, it is my recollection that the Israeli government was willing to give the assurances sought because "it was financially beneficial to Israel for them to do this" . . . I have no general or specific recollection of Mr. Wallach or anyone else informing me at any time that the Israeli Labor Party would be receiving funds from the pipeline project or in connection with the pipeline project.

As Mr. Meese's sworn testimony makes clear, he had no actual knowledge, at the time he took action related to the pipeline project, of any promise to the Labor Party, let alone an illegal foreign payment.

(b) Constructive knowledge -- Nor was there evidence to put Mr. Meese on notice that criminal activity was being planned,

from which his constructive knowledge might be inferred. A review of all the memos received by Mr. Meese related to the project demonstrates that no criminal activity can fairly be inferred from reading those documents. Indeed, it is only the two memoranda of September 25 that contain any language that could remotely be interpreted to raise such questions.

The first Wallach memorandum of September 25, which exceeded four pages of single-spaced typing, discussed principally the then-current problem -- to obtain financial insurance to back up the guarantee that had been given by Israel a half-year earlier not to bomb the pipeline as it was being constructed. Mr. Wallach refers in this memorandum to "the never-to-be-stated but fully understood quid pro quo which helped to produce that commitment by" Israel. As the participants in the project understood, however, the "quid pro quo" that "produce[d] that commitment" was an agreement between Mr. Rappaport and the Government of Israel that, as the "oil lifter," Mr. Rappaport would make available to Israel substantial amounts of the oil that would be generated from the pipeline, and not any illegal bribe. ^{14/} That understanding was, for obvious reasons, so sensitive that it was "never-to-be-stated." Had it been publicly disclosed, Iraq and Jordan would never have agreed to such an arrangement. The fact that Israel might benefit

^{14/} Upon public disclosure of this memorandum, Prime Minister Peres acknowledged that Israel was to receive oil from the pipeline at discounts worth \$65-70 million a year. See The New York Times, February 25, 1988, p. A17.

economically from giving the assurances sought would obviously have been proper, and indeed understandable.

Nor can Mr. Wallach's second memorandum fairly be read to create constructive knowledge of an FCPA violation. That memo, given to "demonstrate the credibility and relationship" of Mr. Rappaport to Israel, did not deal principally, or even substantially, with any payments to the Israeli Labor Party. It covered a variety of subjects, all designed to demonstrate Mr. Rappaport's "close personal relationship to [Israel] and its leadership." The ambiguous language on which any inference of a illegal payment must depend was buried amid many other items that Mr. Wallach obviously believed to be equally important:

(a) that Mr. Rappaport had received information from the Israeli government indicating that Soviet Jews would be permitted to emigrate only to Israel;

(b) that Mr. Rappaport "has been financing private polls for quite a long time in Israel on behalf of labor-Peres";

(c) that Mr. Rappaport's private polls demonstrated "increasing strength for labor" and the likelihood of elections in Israel by March 1986;

(d) that Mr. Peres had "emphatically" told Mr. Rappaport that the release of Benjamin Weir was "as a result of the efforts of the State of Israel, and no one else";

(e) that Israel would arrange for the release of "the remaining six" hostages;

(f) that the United States "owes" a debt to Israel that should be reflected in "the accomplishment of this project, as outlined in my memo"; and

(g) that Mr. Rappaport would be communicating to Iraq at an upcoming international meeting his "private banking proposal" for funds to be provided to Iraq in connection with the pipeline project.

It was immediately following the reference to Mr. Rappaport's support of Israel's Labor Party that Mr. Wallach wrote that Mr. Rappaport had confirmed to him that Israel "will receive somewhere between \$65-\$70 million a year for ten years out of the conclusion of the project." He then added -- almost as an aside -- that it was "indicated" to him, and "would be denied everywhere," that "a portion of those funds will go directly to labor."

The ten words "a portion of those funds will go directly to labor" -- sandwiched between discussions of the migration of Ashkenazi Jews and claims of credit for release of a hostage -- could not have put Mr. Meese on notice that a crime was to be committed. Seeing them in context, no one can fairly infer that Mr. Meese or anyone else reading the document should have understood that an illegal promise had been made to obtain the Israeli Labor Party's support for the pipeline project. Even if the ten words are carefully analyzed today, the most reasonable inference from them is that Bruce Rappaport, who had been a substantial financial supporter of the Labor Party, would be sharing the large amounts of money he would receive as a result of the "oil lifter rights" he held with the Government of Israel and with the Labor Party. Mr. Meese could not have known that

there was anything illegal in that conduct, either under Israeli law or under the Foreign Corrupt Practices Act.

The statement that funds "will go directly to labor" does not suggest that any illegal promise had been made. Israel provides direct governmental funding to its political parties, and allows unlimited political contributions from foreign individuals. Hence, Attorney General Meese would reasonably have believed that the memo referred simply to legal payments under Israeli law that might be made to the Labor Party. Nor does the statement that this "indication" would be "denied everywhere" change this conclusion. The fact that Mr. Rappaport intended to provide large amounts of financial support to the Labor Party, or that through some other governmental arrangement the Labor Party would be receiving indirectly some of the project's proceeds, could cause political embarrassment in Israel and was obviously not a matter to be publicized. As innumerable Wallach memos demonstrate, Mr. Wallach frequently used phrases suggesting intrigue and secrecy in his memoranda, even on subjects that were patently innocuous.

The fact is that this single sentence in a voluminous pile of memos, on a subject of only incidental interest or knowledge to Mr. Meese, did not generate any reaction on his part, nor should it have done so. The written material Mr. Meese received from Mr. Wallach in relation to the project supported the inference that the "quid pro quo" for the Israeli assurances

was a legal economic benefit. Anyone vaguely familiar with the geopolitics of the Middle East, and the fact that Israel had already been promised that it would receive substantial oil from the pipeline, would know that no additional inducement was necessary to obtain agreement from Israel or the Labor Party to a non-aggression policy. Indeed, even without the availability of oil from the pipeline, it was plainly to Israel's advantage to encourage dependence by Jordan and Iraq on Israel's good will.

In short, the reason that Mr. Meese never "discuss[ed] with Mr. Wallach any concern [he] may have had about the propriety of the Labor Party receiving a portion of the funds in this project" (Tr. at 47), was that Mr. Meese had no reason to have any concern. As his testimony makes clear, it did not occur to Mr. Meese that the financial benefit which Israel expected to receive might consist in part of an illegal payment to the Labor Party. The documents he received regarding the project establish that that belief was entirely reasonable.

2. Mr. Meese had no knowledge that Mr. Wallach had any financial interest.

Besides his lack of knowledge of an illegal payment, Mr. Meese had no knowledge of another essential element of an FCPA violation: He did not know that Mr. Wallach had any financial interest in the pipeline project. Mr. Meese believed then -- and has no reason to think otherwise today -- that Mr. Wallach's actions were taken solely in his capacity as Mr. Rappaport's legal representative.

When Mr. Meese called Mr. McFarlane in the early summer of 1985 with regard to the project, Mr. Meese knew "that Mr. Wallach was representing Mr. Rappaport." Tr. at 16. He assumed, at that time, that Mr. Wallach "had been retained in some way and was receiving money for this representation." Id. Only in the Fall of 1986 did Mr. Meese have any knowledge of the specific amount of money involved. At that point, he learned that a payment in excess of \$100,000 for Mr. Wallach had been sent by Mr. Rappaport to Mr. Chinn. Tr. at 19. This amount was within the range that an attorney regularly consulting and meeting on behalf of a client might charge.

Mr. Meese reaffirmed his understanding that Mr. Wallach was simply acting as Mr. Rappaport's attorney when he testified to the Independent Counsel (Tr. at 17):

- Q. . . . Have you had a chance since we last met to give that any further reflection as to whether or not Mr. Wallach ever indicated to you that if the project were successful he would himself have a material gain from it?
- A. Yes, I have thought about it and I have no recollection that he did tell me that he would have financial gain other than through his representation of Mr. Rappaport.

Since Mr. Meese knew only that Mr. Wallach was acting as Mr. Rappaport's agent, he could not have known that Mr. Wallach could be deemed to be a "domestic concern" subject to the FCPA's restrictions. Even if Mr. Meese had known of a payment to the Labor Party, and even if he had been told that it was a condition of favorable action, he would not have known that a "domestic

concern" had any ownership in the project to bring it within the United States' criminal jurisdiction.

C. Mr. Meese Lacked Criminal Intent.

Just as one cannot infer Mr. Meese's knowledge of any FCPA violation, one cannot conclude from the evidence that he possessed the "specific intent to facilitate the commission of [that] crime." United States v. Raper, 676 F.2d at 849. To charge Mr. Meese, the prosecution would have to prove a "community of unlawful intent" to violate the FCPA shared by Mr. Wallach and Mr. Meese. United States v. Cowart, 595 F.2d at 1031. While an aider and abettor need not know "every last detail" of the substantive offense, "he must share in the principal's essential criminal intent." United States v. Sanborn, 563 F.2d 488, 491 (1st Cir. 1977); see also United States v. Barfield, 447 F.2d at 88 ("[T]he Government must show that Barfield shared the criminal intent or purpose of the actual perpetrators of the crime and that he knowingly assisted them in the accomplishment of that purpose."). That intent must be the same intent required for the underlying statute -- here, the FCPA. See United States v. Longoria, 569 F.2d at 425 (intent to assist a bank robbery not sufficient where crime requires intent to use a weapon to do so; intent to possess drugs not enough where crime requires intent to distribute drugs).

1. The FCPA requires "corrupt" intent.

Under the FCPA, the intent requirement is contained in the provision that domestic concern must have made use of the

mails or other means of interstate commerce "corruptly" in furtherance of an offer, payment, promise to pay, or gift to a foreign official or political party for business purposes. 15 U.S.C. § 78dd-2(a). Although "corruptly" is not defined in the statute, the Senate Report accompanying the final bill explains:

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

S. Rep. No. 95-114 at 10. The House Report is to the same effect. H.R. Rep. No. 95-640 at 8. As the domestic bribery cases referenced by the legislative history make clear, a "corrupt" intent requires a specific intent to accomplish "an unlawful result." United States v. Brewster, 506 F.2d 62, 71 (D.C. Cir. 1974); see also United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978); Corruption and the FCPA at 172 ("corruptly" means that "an element of scienter, consciously breaking the law, is required").

Further, Mr. Wallach's and Mr. Meese's specific intent to violate Israeli law would have to be established to prove that Mr. Meese had the "corrupt" intent required to violate the FCPA. One commentator has noted that the "corruptly" as used in the FCPA means "knowingly and willfully intending to influence a foreign nation's decision-making through a payment forbidden by

that nation's laws." Corruption and the FCPA at 175 (emphasis omitted). In light of the FCPA's clear intent to prohibit only payments unlawful in the country where made, this is the only definition consistent with the legislative history and purposes of the Act. In view of the uncertainties of Israeli law, it is clear that neither Mr. Meese or Mr. Wallach possessed -- or could have possessed -- the necessary "corrupt" intent.

2. Mr. Meese had no personal motive to violate the FCPA

Criminal intent to aid and abet may be inferred "from the whole circumstances," or established by "explicit proof of expressed intention." United States v. Sanborn, 563 F.2d at 491. The circumstances of this case give rise to no inference of this kind, however, because Mr. Meese could have had no personal interest in seeking to corrupt Prime Minister Peres.

Mr. Meese had no financial stake or interest in the pipeline project, and absolutely nothing to gain personally if it proceeded. An interest or stake in the criminal transaction may not be an absolute prerequisite to a conviction for aiding and abetting, see United States v. Winston, 687 F.2d 832, 835 (6th Cir. 1982), but a "financial motive to cooperate" may be an important factor in establishing an aider and abettor's unlawful collaboration. United States v. Cades, 495 F.2d at 1169. Mr. Meese had no financial reason to further any unlawful payment, and nothing to profit from the successful completion of the alleged scheme.

There is, similarly, no evidence that Mr. Meese "made any attempt to conceal" his limited role in the pipeline project, another factor from which criminal intent might be inferred. United States v. Cades, 495 F. 2d at 1169; cf. Benchwick v. United States, 297 F.2d 330, 332-333 (9th Cir. 1961). Mr. Meese's actions with respect to the pipeline were entirely open. Indeed, much of the documentation in the case has come from material maintained among Mr. Meese's records at the Department of Justice.

While Mr. Meese and Mr. Wallach were friends, "a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider and abettor." United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962). Courts have repeatedly rejected attempts to use evidence of innocent meetings and non-criminal discussions to show an aider and abettor's awareness of the principal's criminal intent. See, e.g., United States v. Cades, 495 F.2d at 1169 (discussion of bank loans does not show collaboration in scheme to defraud bank by misapplication of funds); cf. United States v. Pearlstein, 576 F.2d at 541 ("[E]vidence of mere ongoing friendships, even where the defendants might have known that their friends were engaged in criminal activity, will not support a finding that the defendants knew or should have known of their friends' specific fraudulent intentions.").

In short, there is absolutely no basis here to infer any intent on Mr. Meese's part to violate the law. Even if one were

to assume, arguendo, that Mr. Wallach had the requisite intent, the fact that Mr. Meese often met with Mr. Wallach, or even that they discussed the pipeline project, would not suffice to establish that Attorney General Meese was a collaborator in a criminal scheme to violate the FCPA.

D. Mr. Meese Took No Action to Assist Any Violation of the FCPA.

Finally, the limited and pro forma steps Mr. Meese took to refer the project to those officials who would appropriately consider its merits in no way constitute the kind of acts that might support a finding that he "assisted or participated in the commission of the offense." United States v. Raper, 676 F.2d at 849; United States v. Staten, 581 F.2d at 887. Under general rules of criminal law, "a defendant cannot be convicted of a crime unless he personally participated in its commission." United States v. Dickerson, 508 F.2d at 1217. While 18 U.S.C. § 2 allows the personal participation to take the "limited form" of aiding and abetting, the prosecution would nonetheless have to prove that Mr. Meese "consciously assisted the commission of the specific crime in some active way." Id. This cannot be done.

Mr. Meese's actions relating to the pipeline project were limited to the following:

- (1) A telephone call to Mr. McFarlane in June 1985 to inform him of the project generally and to suggest that Mr. McFarlane speak to Mr. Wallach directly;

- (2) A second discussion with Mr. McFarlane in September 1985 asking his advice about how to respond to a letter from Mr. Peres asking to meet with United States officials;
- (3) A letter to Mr. Peres on October 7, 1985, stating that the pipeline was in the "mutual benefit" of all the countries involved and referring Mr. Peres to Mr. McFarlane;
- (4) A five to ten minute conversation with Mr. Peres at an Embassy party during which Mr. Peres thanked Mr. Meese for his help; and
- (5) Periodic discussions with, and receipt of memoranda from, Mr. Wallach in which Mr. Wallach kept him informed in a very general way about the progress of the project.

Obviously, none of these actions directly furthered any promise to pay the Israeli Labor Party in exchange for assurances that Israel would not bomb the pipeline. The polite discussions and referrals that Mr. Meese engaged in simply cannot be characterized as "affirmative conduct designed to aid in the success of the criminal venture." United States v. Smith, 631 F.2d 391, 395 (5th Cir. 1980).

Even if it could be argued that Mr. Meese's limited actions unknowingly furthered a criminal scheme, the conduct which must be proved is not merely an act that happens to further the criminal scheme, but rather conduct that is actually "designed to aid in the success of the criminal venture," United States v. Smith, 631 F.2d at 395, and that "consciously shares in [a] criminal act." Nye & Nissen v. United States, 613 U.S. at

620. The prosecution would have to meet the onerous test of showing that Mr. Meese

associated himself with the commission of the crime, that he participated in it with a desire that it be accomplished, and that he committed some overt act designed to make it a success.

United States v. Barfield, 447 F.2d at 88.

This requirement of conscious participation in the crime has resulted in the exoneration of persons whose actions merely furthered a venture that had a criminal component. For example, a co-owner of a business whose partner made illegal gratuities to a judge to allow the business to escape traffic fines could not be prosecuted for aiding and abetting the payment of gratuities despite his role in the overall business. United States v. Campbell, 702 F.2d at 265-66. Similarly, the convictions of salesmen who were vital links in a company's fraudulent scheme for the sale of direct-mail pen distributorships were reversed, despite evidence of their participation in the over-all business venture in which the scheme was used. Their role, so far as they knew, consisted of legitimate business activities. United States v. Pearlstein, 576 F.2d at 546.

Mr. Meese may have taken some actions with respect to a venture he thought was worthwhile and that he believed to serve American, as well as Israeli, interests. There is no evidence, however, of "conduct on [Mr. Meese's] part amounting to counseling or other assistance in the prohibited activity."

Grimes v. United States, 379 F.2d 791, 795 (5th Cir.), cert. denied 389 U.S. 846 (1967). Actions designed to further the lawful goals of an enterprise do not amount to conscious participation in criminal aspects of that enterprise. As in Campbell and Pearlstein, participation in the non-criminal aspects of a scheme is conduct "not sufficient to constitute an offense under the aiding and abetting statute." United States v. Tarr, 589 F.2d at 59-60.

Moreover, the alleged promise to make payments to the Israeli Labor Party had been made long before Mr. Meese took any of his actions. Accordingly, the alleged FCPA violation was already complete. Courts repeatedly have held that "[a] person cannot aid or abet a crime which has already been completed." Roberts v. United States, 416 F.2d 1216, 1221 (5th Cir. 1969); see also United States v. Shulman, 624 F.2d 384, 387 (2d Cir. 1980); United States v. Freeman, 498 F.2d 569, 575 (2d Cir. 1974); United States v. Ferraro, 414 F.2d 802 (5th Cir. 1969). Here, it is clear that Mr. Rappaport already had obtained the Israeli assurances by February 1985, and that Mr. Meese did not learn of the project until May 1985. Clearly, Mr. Meese could not have aided and abetted a promise that was already an "accomplished fact" before he ever heard of it, Roberts v. United States, 416 F.2d at 1221 -- if indeed he heard of it at all.

PORTION OF THE JUNE 13, 1988
SUBMISSION TO THE OFFICE OF THE
INDEPENDENT COUNSEL ON BEHALF OF EDWIN MEESE III
REGARDING THE 1985 INCOME TAX ISSUE

ON THIS RECORD, EVEN CIVIL
FRAUD OR NEGLIGENCE PENALTIES
WOULD NOT BE WARRANTED

One of the most extraordinary aspects of the suggestion that a criminal violation was committed is the fact, confirmed by published decisions, that if the Internal Revenue Service had attempted to assess civil penalties against Mr. Meese based on a claim of fraud or negligence, such penalties would not withstand judicial challenge. The evidence of willfulness, or even of negligence, is so bare that even a civil remedy would not be justified.

Civil fraud penalties may be assessed only where there is "intentional wrongdoing on the part of the taxpayer with the specific intent to avoid a tax known to be owing." Conforte v. Commissioner, 692 F.2d 587, 592 (9th Cir. 1982). Here, however, there are none of the "badges of fraud" that might support such a finding of fraudulent intent. There is no evidence of any course of continuing underpayment of tax or other evasive conduct, one of the most important indicia of civil fraud. See, e.g., Lollis v. Commissioner, 595 F.2d 1189, 1191 (9th Cir. 1979); Cohen v. Commissioner, 266 F.2d 5, 12 (9th Cir. 1959). There is no suggestion that Mr. Meese has previously omitted any items of income from past returns, understated his income, taken excessive

deductions, or in any way attempted to avoid paying taxes he legally owed. Under these circumstances, the "omission of a single item of income for a single tax year, standing alone, is not sufficient to establish fraud." Armondo v. Commissioner, 49 T.C.M. 1055, 1061 (1985).

Nor is there any evidence of concealment of information from law enforcement authorities or any other lack of cooperation in the investigation of the tax issues that might help support such a fraud finding. See, e.g., Edelson v. Commissioner, 829 F.2d 828, 832 (9th Cir. 1987). To the contrary, Mr. Meese's conduct has been the model of cooperation that courts have cited to show a complete absence of fraud. See, e.g., Stratton v. Commissioner, 54 T.C. 255, 287 (1970) (reversing a civil fraud penalty). Like the taxpayer in the Stratton case, who was the then governor of Illinois, Mr. Meese has "fully cooperated with the investigating agents," "turned over to them all of his records," made himself available for questioning on numerous occasions, and "tried to answer all of the question put to him in a frank, unreserved, respectful, truthful, sincere and cooperative manner." Id.

As for Mr. Meese's late discovery of the missing cost basis records that led to his inability to include the securities transactions in his initial filing, it is clear that such conduct, standing alone, would be insufficient to support the imposition of a fraud penalty. While the absence of records may be an indication of fraud in conjunction with other evidence, Bradford v. Commissioner, 796 F.2d 303 (9th Cir. 1986), courts

have made clear that evidence of inadequate records alone does "not rise to the level of an intent to evade tax." Palumbo v. Commissioner, 50 T.C.M. 1427, 1442 (1985); Porter v. Commissioner, 51 T.C.M. 477, 485 (1986). In a number of cases, courts have reversed the imposition of fraud penalties where the sole evidence of fraud presented was that the taxpayer's "books were poorly kept," Myers v. Commissioner, 41 T.C.M. 83, 92 (1980), even where there was evidence of "grossly negligent bookkeeping." Palumbo v. Commissioner, *supra*, 50 T.C.M. at 1441; *cf.* Solis v. Commissioner, 47 T.C.M. 726, 728 (1983) (reversing fraud penalty where "suspicion" of fraud is based on, *inter alia*, a "history of inadequate business records"). In one case, the Tax Court found that the taxpayers "should have realized" that he needed "better accounting records" as his business income grew, but the Court still found no basis for imposition of a fraud penalty. "[U]se of poor judgment does not equate into an intent to evade tax." Revader v. Commissioner, 41 T.C.M. 240, 247 (1980). Only where the absence of records discloses a taxpayer's deliberate attempt to avoid "having knowledge of his income at a time when he was aware that such knowledge was necessary" is such evidence sufficient to show fraud -- as where "he knew he would be audited and [knew] that his accountant's failure to prepare returns for prior years was due to lack of adequate records." Swafford v. Commissioner, 32 T.C.M. 528, 535 (1973).

The record is totally barren of any evidence that Mr. Meese's last-minute discovery that he could not locate the records necessary to allow Mr. McKean to prepare the tax return

was a deliberate attempt to keep that information from Mr. McKean, or from anyone else. Such a suggestion is belied by the fact that Mr. Meese was in the process of requesting the necessary information from the attorney for the Herrick Estate, and by the additional fact that he promptly provided that and other information to Mr. McKean when he did receive it.

Indeed, in light of Mr. Meese's prior unblemished history of maintaining records that were clearly adequate to document his deductions and income and to allow Mr. McKean to prepare his tax returns, this one-time inability to obtain the cost basis records in a timely fashion would not even rise to the level of a civil negligence penalty. A penalty for negligence may be imposed where any part of an underpayment of tax is "due to negligence or an intentional disregard of rules and regulations." 26 U.S.C. § 6653(a). Under this standard, the IRS will, in certain cases, impose negligence penalties for the failure to maintain adequate records. See, e.g., Harris v. Commissioner, 745 F.2d 378, 380 (6th Cir. 1984). But not every tax deficiency case in which records may be missing justifies the imposition of a negligence penalty. Courts have been careful to emphasize that the mere fact that a taxpayer has not kept records required by the tax laws "does not require the conclusion that the [taxpayer] has been negligent or in intentional disregard for respondent's rules and regulations in the manner in which he maintained his records." Robinson v. Commissioner, 51 T.C. 520, 541 (1968), aff'd in pertinent part and vacated in part, 422 F.2d 873 (9th Cir. 1970). Otherwise, a negligence penalty would be

assessed every time the Internal Revenue Service found a taxpayer to have violated the recordkeeping provisions of the Internal Revenue Code, which was obviously not Congress' intent.

Looking to the cases in which such penalties have been considered, it is clear that the courts would find no negligent conduct here. For example, no negligence penalty will be levied where a taxpayer has kept "regular books of account" that are generally adequate, but "were not detailed enough to support all of the deductions he took." Zitzewitz v. Commissioner, 28 T.C.M. 70, 73 (1969); see also Porter v. Commissioner, 51 T.C.M. 477, 485 (1986) (reversing negligence penalty where taxpayer's records were "insufficient to substantiate the entire amount of the claimed deductions," but where many of the deductions were allowed). Such cases reflect the courts' commonsense determination that a taxpayer is not required to "keep perfect records" in order to meet the Service's standards, but only records which "for the most part . . . represent[] a proper record" of the taxpayer's expenses. Nelson v. Commissioner, 33 T.C.M. 1057, 1073 (1974); see also Ward v. Commissioner, 37 T.C.M. 928, 932 (1978) (reversing negligence penalty); Silverton v. Commissioner, 36 T.C.M. 817, 835 (1977) (same).

The cases in which such penalties have been upheld have involved clearly punishment-worthy conduct. A taxpayer's "utter failure to keep adequate records" of transactions involving "millions of dollars" has been found to constitute adequate evidence of negligence, Askew v. Commissioner, 49 T.C.M. 876, 892 (1985), aff'd, 805 F.2d 830 (8th Cir. 1986), as has the

preparation of a tax return "without a single document relating" to a major source of income. Estate of Simkins v. Commissioner, 37 T.C.M. 1388, 1406 (1978). Such penalties have been found to be merited where there was a "total failure by taxpayers to maintain any records," id.; Finney v. Commissioner, 39 T.C.M. 938, 953 (1980), or where the records that were kept were found to be "generally incomprehensible." Potito v. C.I.R., 534 F.2d 49, 51 (5th Cir. 1976), cert. denied, 429 U.S. 1039 (1977). But the type of conduct involved here, where a taxpayer's records are excellent overall and he has made diligent efforts to replace the single item of information that is missing, cf. Olivares v. Commissioner, 47 T.C.M. 165, 172 (1983), is not even remotely similar to the type of behavior that the courts have found to be "negligent."

Indeed, it is particularly compelling that the single piece of information that Mr. Meese found to be missing when he turned to his income tax returns in October 1986 -- the cost basis for the stocks sold -- was not the type of item that Mr. Meese had ever been required to produce in prior years, and not the type of information that is routinely included in a taxpayer's books and records. In reversing negligence penalties that were assessed by the Internal Revenue Service in Robinson v. Commissioner, supra, the Tax Court stressed that the business expense records found to have been inadequate in that case were "not the type generally regarded as constituting a taxpayer's permanent books of account." 51 T.C. at 542. Under such circumstances, and where the taxpayer did keep "regular books of

account listing his income, various office expenses, and other expenses," the court found that his failure to have the specialized records necessary to sustain a business expense deduction did not show that his bookkeeping methods were negligent. Id.; see also Tyler v. Commissioner, 43 T.C.M. 927, 934 (1982) (reversing negligence penalty); Buckner v. Commissioner, 41 T.C.M. 1230, 1231 (1981) (same); Steel v. Commissioner, 28 T.C.M. 1301, 1306 (1969), aff'd, 437 F.2d 71 (2d Cir. 1971) (same). This conclusion is equally true here, where cost basis records for the Meese family securities had not been the type of records that were routinely required for their tax returns in the past. Mr. Meese's conduct in attempting to locate, and then replace, those records as soon as he realized they were absent was simply not negligent.

An indication of the fact that Mr. Meese's conduct would never merit even a civil negligence penalty is the fact the amended return did not receive anything more than the routine attention by the local office of the Internal Revenue Service when the amended return was filed. After that office received Mr. Meese's amended return disclosing the sale of the securities and the additional amount of tax due, it wrote to Mr. Meese requesting only an additional \$38.32 in interest on the amount due. If the local office treated the matter so routinely, it is difficult to comprehend how anyone could reach the conclusion that Mr. Meese's conduct was worthy of a civil penalty, let alone and accusation that criminal penalties would be denied.

OFFICE OF INDEPENDENT COUNSEL

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In Re: :
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POSSIBLE VIOLATIONS OF :
18 U.S.C. 201, et seq. :
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1111 18th Street, N. W.
Suite 500
Washington, D.C.

Sunday, November 22, 1987

Deposition of:

EDWIN MEESE, III

was taken before Karen S. Scheinberg, a Notary Public in and
for the District of Columbia, commencing at approximately
3:15 o'clock, p.m.

BEFORE: JAMES McKAY, ESQUIRE
Independent Counsel

CAROL BRUCE, ESQUIRE
Associate Independent Counsel

LOVIDA H. COLEMAN, JR., ESQUIRE
Associate Independent Counsel

BERNARD JOHN BARRETT, ESQUIRE
Associate Independent Counsel

CHARLES BLANCHARD, ESQUIRE
Associate Independent Counsel

SUBURBAN REPORTING SERVICE
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(301) 340-2991

1 pipeline from Iraq to Jordan was a possible additive to
2 introducing economic consideration to the troubled land.

3 That handwritten letter from Mr. Peres was dated
4 September the 19th, 1985.

5 A What was that dated?

6 Q September the 19th, 1985.

7 A Oh, yes; okay.

8 Q And he also indicated that he would go a long way
9 to help out with respect to the pipeline project.

10 A Yes.

11 Q Upon receipt of that memorandum, that letter from
12 Mr. Peres in September, and receipt of the memorandum from
13 Mr. Wallach dated September 25th, 1985, what was your under-
14 standing as to what Mr. Peres was willing to do? Was it your
15 understanding that he was willing to give the assurances that
16 Mr. Rappaport was seeking that they would not interfere with
17 the construction of the pipeline in a hostile or military
18 fashion?

19 A Yes, that was my understanding.

20 Q And was it your understanding either from the let-
21 ter from Mr. Peres or from Mr. Wallach's memo of September
22 25th or from conversations with Mr. Wallach as to why it was

1 that the Israeli government was willing to take that posi-
2 tion?

3 A My understanding was that it was financially bene-
4 ficial to Israel for them to do this.

5 Q In what respect?

6 A And that they would be receiving money from the
7 pipeline project in some way.

8 Q What was your understanding as to how they would be
9 receiving money or what money they would be receiving?

10 A It was my understanding that they would be receiv-
11 ing money out of the profits of the pipeline project and that
12 they would benefit from it in that way.

13 Q Now would this be the Israeli government and/or a
14 part of the Israeli government, the Labor party?

15 A Well, in the -- I don't have a detailed recollec-
16 tion that is that extensive but the 25th of September, 1985
17 memorandum from Mr. Wallach talks about receiving information
18 from Mr. Rappaport that there had been an arrangement with
19 Peres to the effect that Israel would receive something
20 between \$65 and \$70 million a year for ten years out of the
21 conclusion of the project and that a portion of those funds
22 would go directly to the Labor party.

1 Q Was that your understanding in September, 1985 that
2 that was the arrangement?

3 A Again I can't recall specifically but that cer-
4 tainly would be consistent with my understanding and would
5 explain why Mr. Peres was personally interested

6 Q Do you have any specific recollection of Mr.
7 Wallach telling you of the Labor party's interest or finan-
8 cial stake in this operation?

9 A I have a general recollection but even as we sit
10 here now I don't know how that was all going to be achieved.

11 Q As to how they were actually going to receive the
12 funds?

13 A Right.

14 Q You just had a general recollection that they were
15 going to receive the funds?

16 A Well, I have a general recollection that the Labor
17 party was very much interested and what I read in the memo-
18 randum of the 25th of September, while I don't recall it
19 other than through the words of the memo, is consistent with
20 my recollection.

21 Q When you met with Mr. Peres at the embassy on or
22 about October 16th of 1985 and you had that conversation, a

1 private conversation with Mr. Peres, did he -- what did he
2 speak to you about in that conversation?

3 A He indicated to me that he was personally inter-
4 ested in the success of the pipeline project.

5 Q Did he tell you why he was personally interested in
6 the success of the pipeline project?

7 A I don't recall anything further than that he was
8 interested and he was interested in making clear that Israel
9 would not interfere with the pipeline project or attack the
10 pipeline project

11 Q Did he in that conversation discuss anything other
12 than the pipeline project with you?

13 A I believe that he may have discussed with me his
14 desire that I come to Israel since this had been a matter of
15 some discussion before with various Israeli representatives.

16 Q At the time of that conversation with Mr. Peres how
17 long did it take place if you can recall, this conversation
18 at the embassy that we're referring to?

19 A I believe the whole conversation was probably some-
20 where between five and ten minutes at the most.

21 Q And you say that at one point during the conversa-
22 tion Mr. Wallach stepped into the conversation?

1 A Yes, he joined the conversation at some point after
2 Mr. Peres and I had talked together for a while.

3 Q And when he joined the conversation were you talk-
4 ing about the pipeline matter?

5 A I can't recall precisely what we were talking about
6 but before Mr. Wallach had joined the conversation, Mr. Peres
7 had told me that he was personally interested in it and that
8 he was planning to meet with Bud McFarlane.

9 He said something to the same effect after Mr.
10 Wallach joined the conversation.

11 Q I believe what we're talking about is covered in
12 part on page 4 of your statement, the first paragraph of page
13 4, and I think you also indicated to us previously that Mr.
14 Peres stated that he appreciated your help in the project.

15 A Yes.

16 Q Did he indicate specifically to you what he knew
17 about your help with respect to the project? Was he specific
18 in saying, "We appreciate what you did with respect to this,
19 that, and the other thing"?

20 A I don't know that he said that particularly. I
21 think he was referring generally to my having gotten the
22 information to Mr. McFarlane, gotten Mr. Wallach in touch

1 with Mr. McFarlane. I believe that's what he was referring
2 to.

3 Q You believe that because of the fact that he was
4 also discussing the fact that he was going to meet with Mr.
5 McFarlane? Why did you believe that?

6 A Well, because he seemed to know what I had done and
7 that is what I had done. I think what he said was consistent
8 generally with what I knew about it.

9 Q Did he say anything more than just thanking you for
10 your assistance in putting Mr. Wallach through to Mr.
11 McFarlane?

12 A I think it was more general. He said he appreci-
13 ated my help or my support for the project.

14 Q In that conversation did Mr. Peres make any refer-
15 ence to the Israeli financial stake in the success of the
16 pipeline, or specifically in the Labor party's stake in the
17 success of the pipeline?

18 A I don't believe he made any reference to the Labor
19 party's stake and may have made some reference to the general
20 -- that it was generally to the benefit of Israel finan-
21 cially, but I don't recall specifically.

22 Q In the September 25th memo, the short two page memo

1 which accompanied the handwritten letter from Mr. Peres to
2 you, Exhibit No. 110, in the paragraph which is numbered num-
3 ber 3 --

4 A Yes.

5 Q -- Mr. Wallach says, "what was also indicated to me
6 and which would go denied everything." Did he tell you why
7 it would go denied everywhere, the fact that a portion of the
8 funds would go directly to the Labor party?

9 A I don't remember that ever being discussed other
10 than in this particular memorandum.

11 Q You don't remember it ever being discussed that it
12 would be denied everywhere?

13 A No, or anything -- or that much detail about the
14 funding, including the dollar amounts and where they would go
15 and so on.

16 Q You don't remember it being discussed in writing or
17 you just don't remember it being discussed orally?

18 A I don't remember it being discussed at all other
19 than in this paragraph in this memo.

20 Q Let me show you again Exhibit No. 112 for identifi-
21 cation, the other memo of September 25th, and invite your
22 attention to page 3 of that memo, the top paragraph that is

1 continuing over from page 2.

2 The first full sentence reads, "In addition, we all
3 recognize that there would be no progress to this point had
4 he," meaning Bruce Rappaport, "not been able to obtain the
5 security package which involves the never to be stated but
6 fully understood quid pro quo which helped to produce that
7 commitment by the friendly country."

8 If you read all of these memos you understand that
9 the friendly country is Israel

10 This conversation or this part of the memo is a
11 part of the memo in which he is protesting that OPIC and oth-
12 ers within the United States government appear to be unhappy
13 about the fact that Bruce Rappaport stood to make a lot of
14 money on this project and maybe that was bringing about some
15 nonresponsiveness by government personnel.

16 Do you recall discussing this, the fact that it was
17 a never to be stated quid pro quo, with Mr. Wallach?

18 A No, I don't remember discussing that with him.

19 Q Do you recall discussing with Mr. Wallach the fact
20 that he was unhappy with the progress in the U.S. government
21 agencies in getting financing or political risk insurance for
22 this project?

1 A I have a general recollection of that coming up in
2 his conversations with me on at least one occasion.

3 Q Did you ever discuss with Mr. Wallach any concerns
4 you may have had about the propriety of the Labor party
5 receiving a portion of the funds in this project, any con-
6 cerns that you had about that?

7 A No. I don't recall discussing the Labor party
8 receiving the funds at all. It's in that memorandum and I
9 probably read it at the time to the extent that I read it
10 that carefully but I don't recall it ever being discussed.

11 Q Mr. Wallach highlights it as being a matter that is
12 sensitive in both September 25th memorandum, and even as you
13 read the memos, as the memos begin, he wonders about how much
14 of this issue he should be putting in writing -- and yet he
15 goes on and puts it all in writing.

16 Did Mr. Wallach at any time either before these
17 memorandum were written on September the 25th of 1985 or
18 thereafter give you any indication as to how the funds were
19 going to go from the pipeline to the government and to the
20 Labor party?

21 A No, I don't believe that he did, at least I have no
22 recollection of him doing that.

1 Q Did he give you any indication as to how many
2 people knew about this Israeli stake and the Labor party
3 stake in the pipeline project?

4 A No. My recollection -- the only recollection I
5 have is of -- particularly in regard to that reference to
6 quid pro quo in the 25th of September memo, was it was the
7 general benefit to Israel.

8 I have no even general recollection of the benefit
9 to the Labor party other than as is expressed in that other
10 memorandum that you showed me.

11 I know -- I believe that there was no other discus-
12 sion at all, or at least I don't remember any discussion
13 about how the money was going to go, and to me it appeared
14 that Israel would have had a beneficial interest coming as a
15 part of the total transaction, but exactly how that all
16 worked I didn't know.

17 Q In the memo of September the 25th, 1985 in which he
18 talks about the quid pro quo on page 3 of that memo, he opens
19 the memo by saying that he has provided the information to
20 you orally, "and I will place in the memo form for my own
21 files and make it available as you determine to be appropri-
22 ate."

1 Would it be a fair statement that he would provide
2 you orally with most of the information that would be in his
3 memoranda and then he would just reduce to writing that which
4 he has already told you orally?

5 A Probably --

6 MR. ROCAP: In the context of this pipeline matter
7 only?

8 MS. BRUCE: Let's confine it to the context of the
9 pipeline matter.

10 THE WITNESS: Probably that is generally correct
11 although often there would be more in the memoranda, more
12 detail in the memoranda, than I recall from any of the con-
13 versations.

14 BY MS. BRUCE:

15 Q Did you in any of your conversations with Bud
16 McFarlane, with Mr. McFarlane, the national security adviser
17 to the President, did you in any of your conversations with
18 him in 1985 indicate to him that there was an Israeli finan-
19 cial stake in this operation?

20 A I do not recall doing that although I may have. I
21 had really only one discussion with him. Now when?

22 Q 1985.

1 A I had the discussion referring Mr. Wallach to him.
2 I may have had other discussions but I don't recall whether
3 this issue came up. There may have been a discussion of the
4 fact that Israel was interested in the project but beyond
5 that I don't know -- I don't remember any discussion with him
6 about that.

7 Q Well, apart from your discussion with Mr. McFarlane
8 about the general Israeli government financial interest in
9 the project, do you have any recollection of having a spe-
10 cific discussion with Mr. McFarlane about the Labor party's
11 financial interest in the operation?

12 A No.

13 Q No, you have no recollection?

14 A I have no recollection and I don't really recall
15 having focused on that until reading it in the memo there.

16 Q Okay. Until reading it in the memo there today?

17 A Today, yes.

18 Q Now are you saying that it's your recollection that
19 Mr. Wallach -- strike that.

20 Let me show you what we will mark as Exhibit 114
21 for today's proceeding. It is an article in the Washington
22 Post dated October the 17th, 1985 and it is found on B2 of

DECLARATION OF EDWIN MEESE III
REGARDING DEPOSITION TESTIMONY OF NOVEMBER 22, 1987

While the testimony that appears at pages 31 through 51, pages 59 through 60, and pages 106 through 109 of the November 22 transcript, when read as a whole, provides an accurate statement of my recollection regarding the September 25 memoranda and certain related events, there are certain answers that could be misconstrued if taken out of context. Accordingly, I would like to make the following statement with respect to that testimony:

1. I have a general recollection of receiving the two September 25 memoranda from Bob Wallach. I do not recall reading them in their entirety, reading them in any detail, or reading them with any particular care. This is consistent with my testimony at page 47, lines 7-10, where I stated that I "probably read [statements in the memorandum] at the time" but indicated my doubt that I read the memorandum "that carefully." My statement at page 31, line 22, which states, in response to the compound question whether I recall receiving and reading the memorandum, that I "have a general recollection of that" should be understood in that light. I do not have any recollection of reading the passage of the second September 25 memorandum that a portion of the money to be received by Israel "will go to labor" or that that fact would be "denied everywhere" prior to this investigation.

2. As I testified a number of times, it is my recollection that the Israeli government was willing to give the assurances sought because "it was financially beneficial to Israel for them to do this." Page 40, lines 3-4; page 44, lines

18-21; page 48, lines 4-7; page 106, lines 14-22. I have no general or specific recollection of Mr. Wallach or anyone else informing me at any time that the Israeli Labor Party would be receiving funds from the pipeline project or in connection with the pipeline project. I testified to this at several points during my deposition, at page 45, lines 5-19; at page 47, lines 7-10; page 48, lines 4-10; page 50, lines 13-17; and page 108, lines 8-19. My testimony at page 40, line 15 through page 41, line 20, must be read and understood in that light. In that regard, three points regarding that testimonial portion should be made:

a. In my answer at page 40, lines 15-22, the information that I provided was the text of the September 25 memorandum, rather than my independent recollection of discussions. The question posed was whether I had an understanding as to the recipient of the "money out of the profits of the pipeline project" (page 40, line 10-12). I answered that I did not "have a detailed recollection that is that extensive." At that point in my answer, Mr. Lewin, who was sitting to my left, handed me the September 25 memorandum, and, to be of assistance to the questioner, I pointed out what "the 25th of September memorandum from Mr. Wallach talks about" on that issue. A comparison of my answer with the text of the memorandum shows that I was paraphrasing, and in major part quoting, the statements in paragraph 3 of the September 25

memorandum. I did not then recall the contents of the memorandum and would not have been able to summarize or paraphrase the reference to the Labor Party if I had not had the document in my hand.

b. The next question asks whether my "understanding" of the arrangement was the same as that set forth in paragraph 3 of the memorandum. I again answered by stating first that "I can't recall specifically." To be helpful to the questioner, I then went on to observe that it was "consistent with my understanding and would explain why Mr. Peres was personally interested." My point in providing this additional observation was that I recalled that Israel was going to "be receiving money out of the profits of the pipeline project" (page 40, line 11), and I recalled that Mr. Peres was personally interested in the project. While I do not recall knowing or being told that the Labor Party would benefit financially from the project, seeing the statement in paragraph 3 of the September 25 memorandum and focusing on it for the first time on November 22, 1987, I testified that that apparent financial benefit described was consistent with Israel's and Mr. Peres' interest in the matter.

c. The next question asked whether I had a specific recollection of Mr. Wallach telling me "of the Labor Party's interest or financial stake" in the project. I answered that I had a "general recollection," but "even as we sit here now I don't know how that was all going to be achieved." As is made clear in the two clarifying questions and answers that follow, I was stating that I had a "general recollection that the Labor

Party was very much interested" in the project. I was not stating that I had a recollection, specific or general, that the Labor Party had a financial stake in the project. As noted above, I made that point clear at several other points in my deposition.

3. At certain points in the questioning, I made statements to the effect that I did not recall certain matters "being discussed other than in this memorandum" (for example, page 45, lines 9-10, 18-19, and page 59, line 13 through page 60, line 1). That should not be construed to mean that I recall having previously read the words or the concept in the memorandum. It is my shorthand way of stating that the words or the concept were obviously "discussed" in writing by Mr. Wallach in a memorandum that was given to me, but that I do not recall personally discussing them. Nor do I recall reading or focusing on them at the time I received the memorandum. I made that clear in my answers at page 47, lines 7-10 and at page 50, lines 13-17.

Pursuant to 28 U.S.C. § 1746, I hereby declare that the foregoing is true and correct to the best of my knowledge and belief.


EDWIN MEESE III

February 17, 1988

**DIVISION FOR PURPOSE OF APPOINTING INDEPENDENT COUNSEL
ETHICS IN GOVERNMENT ACT OF 1978, AS AMENDED**

DIVISION 87-1

Dated: Washington, D.C.
July 14, 1988

In accordance with 28 U.S.C. §595(b)(3), and pursuant to the Order of this Court dated July 6, 1988, Bruce Rappaport hereby requests that the following comments of Mr. Rappaport be included as an appendix to the report submitted to this Court on July 5, 1988 by the Independent Counsel, James C. McKay, Esq. (the "Report").

Mr. Rappaport has not received a copy of the entire Report. He has, however, been provided with a copy of those portions of the Report concerning his involvement in the Aqaba pipeline matter, which was redacted to exclude certain grand jury testimony. Mr. Rappaport is in full agreement with the determination of the Independent Counsel as stated in the Report that "there is insufficient evidence to conclude that the FCPA was violated by Mr. Meese or by anyone else." (Report at 577) Nonetheless, Mr. Rappaport feels compelled to comment on a fundamental inaccuracy contained in the Report regarding certain statements he allegedly made to Mr. Wallach.*

* That Mr. Rappaport is not commenting on other facets of the portions of the Report provided to him should not be construed as agreement by Mr. Rappaport with all of the "facts" presented in the Report or the conclusions (explicit or otherwise) reached by the Independent Counsel. Furthermore, due to the voluminous nature of the portions of the Report provided to him, and the fact that he resides abroad, Mr.
(Footnote continued)

Certain portions of the Report provided to Mr. Rappaport unfairly and incorrectly assume, at least implicitly, that Mr. Rappaport told Mr. Wallach of some plan or intention to pay the Israeli Labor Party a portion of the proceeds from the sale of petroleum to be transported by the completed pipeline. As Mr. Rappaport repeatedly told the Independent Counsel during his three day interview with them in February 1988, Mr. Rappaport never offered anything of value to the Israeli Labor Party in return for Israeli assurances regarding the proposed pipeline. Mr. Rappaport also told the Independent Counsel during his interview that he never suggested to Mr. Wallach that such a payment was contemplated.

Although the Report acknowledges that "there is no direct evidence, apart from Mr. Wallach's September 25, 1985 memoranda,* that a bribe was or would be offered to any official of the Israeli Labor Party," it implicitly assumes that Mr. Rappaport told Mr. Wallach that such

(Footnote * continued from previous page)

Rappaport has had very limited time to review and respond to all the material presented to him.

* Mr. Rappaport does not agree that Mr. Wallach's September 25, 1985 memoranda is direct evidence that a bribe was or would be offered.

a payment was contemplated.* Mr. Rappaport told the Independent Counsel that he never made such a suggestion to Mr. Wallach. According to the Report, the Independent Counsel was unable to obtain testimony on this subject from either Mr. Wallach or Israeli government officials. Thus, in the absence of any evidence that Mr. Rappaport told Mr. Wallach about contemplated payments to the Israeli Labor Party, and given the evidence offered by Mr. Rappaport that he made no such statement to Mr. Wallach,

* For example, the Report, at page 49, states:

The evidence developed by the Independent Counsel shows that Mr. Meese, upon learning from Mr. Wallach of Mr. Rappaport's statements about a promised covert payment to the Israeli Labor party, took no action to terminate United States government involvement in the Aqaba pipeline project . . .

Similarly, at page 577, the Report states:

The evidence does show, however, that Mr. Meese was expressly informed by Mr. Wallach of Mr. Rappaport's statement to the effect that a promise had been made to pay the Israeli Labor Party millions of dollars as part of an agreement with the Government of Israel that, in return for payments to the government by Mr. Rappaport, the Government of Israel would not take hostile action against the pipeline.

See also Report at 722.

the Report's innuendos in this regard are grossly unfair and simply untrue. Indeed, since the Report was filed, Mr. Wallach has confirmed publicly that Mr. Rappaport never suggested to him any plan to offer anything of value to the Israeli Labor Party in connection with the proposed pipeline.

Furthermore, the Report unfairly attaches significance to the fact that Mr. Rappaport told the Independent Counsel that, with the exception of payments to the Israeli Labor Party, he may have discussed with Mr. Wallach the other subjects referred to in Mr. Wallach's September 25th memoranda. (Report at 722) The Independent Counsel's specious logic, that if Mr. Rappaport discussed issues with Mr. Wallach such as hostage releases and immigration of Russian Jews to Israel then certainly he told Mr. Wallach payments would be made to the Israeli Labor Party, is totally without foundation. Conversely, no negative conclusion should result from the fact that Mr. Rappaport is uncertain about whether he discussed various global political situations with Mr. Wallach but knows that he did not tell Mr. Wallach that he offered money to the Israeli Labor Party in return for their assurances on the proposed pipeline.

Mr. Rappaport has no knowledge of why Mr. Wallach made his statements to Mr. Meese in his September 25, 1985 memoranda regarding future payments to the Israeli Labor Party. That these unsubstantiated phrases have been the basis for a costly, time consuming effort by the Independent Counsel is equally perplexing to Mr. Rappaport. Although the Report concludes that there is insufficient evidence that Mr. Rappaport offered the Israeli Labor Party anything in connection with the pipeline--and although Mr. Rappaport has never been even a target of this investigation--Mr. Rappaport has nonetheless incurred substantial expenses, loss of privacy and damage to his reputation and commercial enterprises as a result of this onerous inquiry.

In re Nofziger, Edwin Meese III
Div No. 87-1
Appendix

**COMMENTS AND FACTUAL
INFORMATION SUBMITTED BY THE
LAW FIRM OF DICKSTEIN, SHAPIRO & MORIN**

The Report of the Independent Counsel discusses briefly (pp. 279-81) Wedtech Corporation's relationship with the law firm of Dickstein, Shapiro & Morin during three days in December 1986. The text is misleading and erroneous in several respects.

On December 8, 1986, Mr. Seymour Glanzer and two other Dickstein, Shapiro & Morin partners arrived in New York City from Washington to meet with officials of Wedtech to discuss a range of legal problems confronting the corporation. A retainer agreement was signed that day, confirming the firm's prior agreement to act as special counsel to the company with respect to accounting matters and related SEC issues. Wedtech's management urged Mr. Glanzer while he was in New York to expand the law firm's representation to include general representation of Wedtech; and at the close of business on December 9, with a view towards retaining the firm to act as general counsel to Wedtech, a Wedtech representative tendered a \$500,000 check to Dickstein, Shapiro & Morin.

The firm discovered shortly thereafter that the check was drawn on an account at a bank that did not appear in the books and records of the corporation. It was also learned that, if the check were cashed, Wedtech would be unable to meet its employee payroll. On December 10, internal discussions were held at Dickstein, Shapiro & Morin to consider the appropriateness of the proposed expansion of the firm's representation of Wedtech. Mr.

Glanzer and the other partners involved concluded that it would be inappropriate under the circumstances for the firm to represent Wedtech in any capacity. Wedtech's Board of Directors was so advised during a telephone conference call on the morning of December 11, 1986. That morning the firm returned to Wedtech the same \$500,000 check that had been tendered to the firm two days earlier.

The Report (pp. 279 and 280) describes a private meeting held among Messrs. Wallach, Moreno, and Guariglia at the law firm's New York office, during which they allegedly discussed a bonus for Mr. Wallach if he could stop the criminal investigation of Wedtech Corporation. No Dickstein, Shapiro & Morin partner or associate was present during any such discussion or was aware that any such discussion occurred, if in fact it did occur. Nor was anyone at the firm aware that Mr. Wallach privately negotiated and received \$95,000 from Wedtech under a separate agreement, if in fact he did.

DICKSTEIN, SHAPIRO & MORIN

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July 14, 1988

In re
Div No. 84-1000
Appendix

Constance L. Dupre, Clerk
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Third and Constitution Avenue, N.W.
Washington, DC 20001

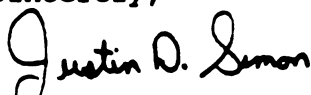
Re: Report of Independent Counsel
submitted on July 5, 1988

Dear Ms. Dupre:

Pursuant to the Order of the Court in the above-referenced matter, filed July 6, 1988, I am submitting the attached comments and factual information in response to references made in the Report of Independent Counsel about the Blake Construction Co., Inc., the Bender Foundation and Howard and Sondra Bender. We request that these comments and factual information be considered by the Court for inclusion as an appendix to the Report, except to the extent indicated in our submission. This filing is being made under seal, in compliance with the Court's Order regarding unauthorized disclosure of the contents of the Report.

At this time, we are providing the Court with an original and ten copies of the Comment. We will provide the Court with an additional two hundred and forty copies on the morning of July 15, 1988, for use by the Court in connection with its release of the Report of Independent Counsel.

Sincerely,


Justin D. Simon

JDS/df

Enclosures

cc: James C. McKay
Independent Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel

Ethics in Government Act of 1978, As Amended

In Re Franklin C. Nofziger,	:	Division No. 87-1
Edwin Meese, III	:	(Judges MacKinnon, Morgan
	:	and Pell)
	:	
	:	<u>FILED UNDER SEAL</u>

COMMENT OF CERTAIN NAMED INDIVIDUALS WITH RESPECT TO
THE REPORT FILED BY INDEPENDENT COUNSEL JAMES MCKAY

On July 5, 1988, Independent Counsel James McKay filed a Report with this Court pursuant to 28 U.S.C. § 595(b)(1). On July 6, 1988, this Court, pursuant to 28 U.S.C. § 595(b)(3), entered an Order directing the Independent Counsel to make portions of that Report available to "each individual, foundation and corporation named in such redacted report. . . ." The Court's Order further provided that each individual named in the Report would be permitted to and including July 14, 1988, in which to file comments or factual information to be considered by the Court for inclusion as an appendix to that Report.

The Report of the Independent Counsel identifies and refers to the activities of the Blake Construction Co., Inc. and its officers, the Bender Foundation, and Howard and Sondra Bender.

According to materials provided by the Independent Counsel pursuant to this Court's Order, reference to these persons appears in the Report at Page 29 to 33, 232, 481 to 507 and 701, note 248. These comments are, therefore, submitted on their behalf.

I. With Respect to The Above-Named Individuals the Report of the Independent Counsel Should Not Be Released to the Public.

Wholly separate and apart from the factual inaccuracies and unwarranted speculation reflected in the Report with respect to the above named individuals, it is respectfully submitted that public release of the above-identified portions of the Report is not authorized pursuant to the Ethics in Government Act of 1978, as amended. Although the Independent Counsel did not release its recommendations, it appears from the Report that the Independent Counsel's Office may not have concluded its investigation with respect to some of the matters with which the above-named individuals were involved. Based on the Statement of the Independent Counsel at footnote 186 on page 482, it appears that no final conclusions with respect to the matters discussed in the report will be made until such time as E. Robert Wallach becomes available as a witness.

To the extent that the Independent Counsel may seek to retain jurisdiction over the matters discussed in his Report with respect to the above-named individuals, it is readily apparent that the Report relating to such matters does not constitute a "Final Report" within the meaning of the Ethics in Government Act.

Should that, in fact, be the case, there is no authority for including reference to such portions of the investigation in the Report that has been filed, as the Report cannot properly be deemed "final" within the meaning of the statute.

Therefore, it is respectfully requested that the above-identified portions of the Independent Counsel's Report be stricken from any Report released to the public. It is further requested that this Court enter an Order directing all individuals who have received portions of the Report relating to these matters be directed to return to the Court, under seal, the above-specified portions of the Report which they received pursuant to this Court Order of July 6, 1988 and any copies thereof.

II. General Comments With Respect to The Independent Counsel's Report

The above-named individuals, having reviewed the report, believe that the Independent Counsel has, without any evidentiary foundation, attempted to link certain unrelated events in an attempt to suggest, without foundation, that these independent actions were improperly motivated. Specifically, when read as a whole, the Report suggests that the decision of the Bender Foundation to make a charitable contribution to the Multiple Sclerosis Society was in some way linked to the pendency of lease negotiations between a limited partnership and the General Services Administration, which involved a property in which the Justice Department was one of several tenants.

We believe that the implication in the Report is unwarranted and unfair. We believe that the evidence clearly establishes the following:

(1) The Bender Foundation's decision to make a contribution of \$40,000 to the Multiple Sclerosis Society in November 1985 was made for three reasons: (a) that Howard and Sondra Bender, principal officers of the Foundation believed that the Operation Job Match program was an extraordinarily worthwhile project being conducted by a charity to which they had made charitable contributions in prior years; (b) that the Bender Foundation has for many years supported numerous programs specifically geared to provide assistance to handicapped individuals such as those that were specifically being targeted for assistance by Operation Job Match; and, (c) based on Mrs. Bender's familiarity with Ursula Meese as a co-member of the Board of Trustees of The American University in Washington, DC, and Mr. and Mrs. Bender's personal and direct knowledge of Mrs. Meese's interests and capabilities, Mr. and Mrs. Bender concluded that Mrs. Meese would be an excellent candidate to make a success of the position of Director of Development for the Operation Job Match Program.

(2) There is absolutely no evidence, to our knowledge, that there was any connection between the 1985 contribution to Multiple Sclerosis and any lease negotiations with the General Services Administration. The Vice President of the Real Estate Division of Blake Construction Co., Inc. who was

personally responsible for the lease negotiations on behalf of the limited partnership which owned the property at 425 Eye Street, N.W., Washington, DC, has confirmed to the Independent Counsel that neither he, nor to his knowledge, anyone on his staff, was even aware of any contribution being made to the Multiple Sclerosis Society in 1985 (or, for that matter, prior to being contacted by the Office of Independent Counsel). There is no evidence that Mr. Bender was in any way involved in lease negotiations between Blake and the General Services Administration or its tenants during 1985. Moreover, the Independent Counsel's Report itself concludes at page 507 that the lease of the 425 Eye Street, N.W., was never discussed with Mr. Meese. Indeed, the Report states that Mr. Meese was not aware of lease negotiations involving 425 Eye Street N. W., and did not even know of Mr. Bender's minority interest in that property.

In view of the foregoing, the Independent Counsel's suggestion of a nexus between the Multiple Sclerosis contribution and the lease negotiation is but mere speculation which we believe flies in the face of direct evidence provided to the Independent Counsel. There is no basis in the Report for the conclusion at page 507 that Mr. Bender may have had "ulterior motives" in supporting the November 1985 contribution to the Multiple Sclerosis Society, which was used by that reputable charity to provide employment to Ursula Meese. We believe that this section of the Report should be stricken as lacking substantial evidence and in

order to prevent undue and unwarranted prejudice to both the Bender Foundation, Sondra and Howard Bender and the Multiple Sclerosis Society (which the Independent Counsel concedes initiated discussions with and independently decided to hire Mrs. Meese and recommended the Bender Foundation as a source of funding for her position).

III. Specific Comments With respect to the Report
of the Independent Counsel

The Report of the Independent Counsel contains a number of erroneous and misleading statements which are used to support the erroneous conclusion discussed in Part II of this Comment. In order to facilitate this Court's review, these issues will be addressed seriatim by reference to the pages on which they appear in the Report. In the limited time provided, it has not been possible to address all of the errors in the Report and, therefore, the undersigned should not be construed to have acquiesced in the accuracy of any portion of the Report not specifically discussed herein. Moreover, the Report contains reference to some matters as to which the above-named individuals have no knowledge or recollection and, therefore, they are not in a position to confirm or deny the accuracy or foundation for the Report.

A. Comments Regarding Page 30

(1) The Independent Counsel's Report fails to note that the November 1985 contribution of the Bender Foundation to Multiple Sclerosis was earmarked for the Operation Job Match Program at the specific

request and direction of the Multiple Sclerosis Society. The evidence shows that Multiple Sclerosis specifically solicited the Bender Foundation for the Operation Job Match Program on October 29, 1985. When the Multiple Sclerosis Society solicited additional funds for the Operation Job Match Program in the Spring of 1987, no such request was made by Multiple Sclerosis to earmark these funds. Accordingly, the evidence shows the 1987 Bender Foundation contribution was not earmarked. The evidence also reflects the consistent practice of the Bender Foundation not to earmark or restrict funds unless specifically directed to do so by the requesting charity.

(2) The Report notes the purchase of the Chester Arthur Building at 425 Eye Street, N.W., in December 1984. The Report states that this acquisition was made by "one of Mr. Bender's partnerships. . . ." The Report fails to note that complete documentation with respect to the acquisition of this building was provided to the Independent Counsel and establishes that Mr. Bender had but a small minority interest in the limited partnership which acquired the property. The Report also fails to acknowledge that Mr. Bender's financial risk as a limited partner was extremely small when compared to the acquisition price of the property and Mr. Bender's assets.

(3) The Report states that on September 30, 1985, "Blake Construction learned of a problem with one of the Chester Arthur Building's major tenants, the Department of Justice." This statement is misleading. Blake learned of a "potential" problem relating to a Department of Justice occupant involving less than a third of the space currently being occupied by the Department of Justice in that building. The occupying tenant was the Office of Information Technology ("OIT") which was utilizing approximately 70,000 square feet of the 250,000 square feet under lease to the General Services Administration at that building. The occupant of the remaining space, the Immigration and Naturalization Service did not, to Blake's knowledge, ever consider leaving the building. Indeed, as early as 1984, the Immigration and Naturalization Service had specifically requested and received approval from Congress for funding to permit it to remain at 425 Eye Street, N.W.

(4) The report erroneously suggests that the Department of Justice held a lease at 425 Eye Street. This was not and never has been the case. The lease at 425 Eye Street was held by the General Services Administration. The Department of Justice was merely a tenant agency. Had the Office of Information Technology ultimately decided to relocate its facilities from its relatively small portion of the

building, there is no evidence to Blake's knowledge that the General Services Administration would not have proceeded to lease that space for the benefit of another federal tenant. Moreover, we believe the evidence uniformly establishes that the consideration given by the Office of Information Technology to relocate its operations was motivated by the desire to be housed in a federally owned building. There is no indication that anyone at Blake viewed such consideration to pose a serious impediment to the continued tenancy of OIT, if for no other reasons than the lead time to effectuate such a plan would require many years of planning; and only a few months remained on the GSA lease.

B. Comments Regarding page 31

(1) The report states that the potential relocation of the Office of Information Technology caused "serious concerns for Mr. Bender's representatives because a refusal of the Department of Justice to renew the lease on favorable terms would likely have serious financial repercussions for Mr. Bender and Blake Construction." This statement is erroneous for several reasons. First, as to the leasing, Blake Construction Co., Inc. had no financial interest in the matter. Second, the Department of Justice was not the leasing entity but was merely a tenant and only a small portion of its space was occupied by the

entity considering relocating. Third, even assuming that the Office of Information Technology could have relocated prior to March 1986, and even assuming that the General Services Administration would not have leased that space for another federal tenant (neither of which assumption is warranted), the Report fails to note that by the Fall of 1985, Blake negotiators had already begun discussions with a potential back-up tenant which required space suitable for its computer operations.

(2) The Office of Information Technology's consideration of relocation, in fact, affected only the lease term of GSA's lease with respect to a small portion of the property. There is no basis upon which to speculate that the five-year term of that lease that was ultimately agreed upon in any way diminished the value of the property. On the contrary, given the fact that the building was ultimately sold as subject to a five-year GSA lease for the Data Center, an equally persuasive case could be made that it enhanced the value of the property. Moreover, even assuming (without any foundation whatever) that the property had not been leased by GSA and that no tenant could be found for the building and the property became subject to foreclosure, Mr. Bender's personal financial exposure for the property would not have exceeded approximately

\$70,000. While we acknowledge that \$70,000 is a substantial sum of money, in the context of Mr. Bender's substantial assets such a loss could by no means be characterized as posing a serious financial threat. The evidence clearly establishes that throughout 1985, Mr. Bender, in fact, showed no special interest in the lease negotiations regarding 425 Eye Street, N. W., and was only periodically informed of the progress of such negotiations as part of routine briefings by the chief of Blake's Real Estate Division.

(3) The Report fails to note that at the time Mr. Bender discussed Mrs. Meese's involvement with the public affairs program for the radio station, there was no specific discussion with regard to her being employed as such. To the extent that the radio station is union affiliated, Mrs. Meese would, if paid at all, have received union scale. The Report also fails to acknowledge that Mr. Bender never requested that the station in fact hire Mrs. Meese. Both Mr. Bender and the station manager informed the Independent Counsel that the station manager was given complete autonomy with respect to the operation of the station. Moreover, Independent Counsel's Office is aware that Mrs. Meese did a pilot tape under the direction of the station's Public Affairs Director, who concluded that Mrs. Meese did not

possess the requisite experience and training to serve as an on-the-air interviewer for a Public Affairs show -- the position in which she was interested.

C. Comments Regarding page 32

(1) There is no evidence that either Mr. Bender or any official of the radio station ever offered Mrs. Meese employment at the radio station. On the contrary, there is evidence that the station was merely considering Mrs. Meese for a public affairs position. Mr. Bender and the Station Manager informed the Independent Counsel that neither had offered her employment, let alone discussed the financial terms of any such employment with her. Finally, we are constrained to note that at page 497 of the Report, that the Independent Counsel concedes that Mrs. Meese decided for reasons of her own that she would not pursue the radio station job. That is entirely consistent with the evidence provided by Mr. Bender and the radio station officials that Mrs. Meese abandoned her interest after hearing a critique of her pilot tape and prior to any offer of employment being made.

(2) The Report states that the Bender Foundation made a \$40,000 contribution to the Multiple Sclerosis Society which was used to benefit

Mrs. Meese and that this was done after the Foundation allegedly ignored a solicitation from Multiple Sclerosis for \$10,000 in April 1985. First, there is no evidence that the Multiple Sclerosis Society solicited funds for Operation Job Match in April 1985. Second, the Report fails to acknowledge at this point, although it does later, that a \$5,000 contribution to Multiple Sclerosis was made at Mr. Bender's direction by his company, Blake Construction Co., Inc., in September 1985.

(3) There is no evidence that Blake, the Bender Foundation, or the Benders were ever informed that any advances would or had been made by the Multiple Sclerosis Society to Mrs. Meese.

D. Comments Regarding page 33

(1) The Independent Counsel Report fails to acknowledge that Mr. Bender had absolutely no recollection of the involvement of Mr. James Jenkins with respect to the leasing of the Chester Arthur Building. The Blake official responsible for the leasing negotiations had no knowledge of any role or involvement of Mr. Jenkins in the leasing of the Chester Arthur building. The Report later acknowledges that Mr. Jenkins himself denies involvement with the lease in 1985. To our knowledge, there is no basis for the suggestion that Mr. Bender ever asked Mr. Jenkins in

1985 to contact the General Services Administration regarding that lease or that Mr. Jenkins had done so.

(2) It should be noted that at this portion of the Report, the Independent Counsel acknowledges that the General Services Administration was responsible for the lease and not the Department of Justice.

(3) Blake Officials were advised by the General Services Administration ("GSA") in mid-December 1985 that the GSA had already decided to issue a solicitation covering the entire area subject to the lease, then set to expire in March 1986. That decision had obviously been made some time before that mid-December meeting and to our knowledge, before Mr. Jenkins was hired for unrelated commercial purposes.

(4) The Report fails to acknowledge the import of the testimony of Blake's lead negotiator which clearly established that no one at Blake believed that the Office of Information Technology would abandon 425 Eye Street, N. W. and that he had always assumed that the Immigration and Naturalization Service intended to remain as a tenant. Blake officials to this day believe that the Office of Information Technology decided to remain in that building because it lacked any viable alternative within the time constraints of GSA's lease and

because of the enormous cost and disruption involved in such a move.

(5) Although we are not in a position to comment with regard to Mr. Wallach's motives in helping the wife of a man with whom he has maintained a close personal friendship since attending law school, there is absolutely no basis for the suggestion in the Report that Mr. Bender "may have had ulterior motives in supporting the Bender Foundation's decision to contribute to the Multiple Sclerosis Society." The Report acknowledges that there was no evidence Mr. Meese was even aware of Mr. Bender's minority interest in the 425 Eye Street property. There is no evidence that Mr. Bender himself made a connection between that contribution and the pendency of leasing negotiations with the General Services Administration regarding that property. Indeed, the evidence is that he did not even inform his lead negotiator that such a contribution had been made.

(6) It should be noted that nowhere in the Report does it acknowledge that the lease ultimately negotiated by the General Services Administration became stalled at GSA for nearly fourteen months after the prior lease had expired in March 1986 and that the terms of that lease were, in fact, less favorable to the partnership than it had sought. Moreover, the Partnership was forced to sue the

General Services Administration when it failed to pay lost interest on back rent. The partnership prevailed in that litigation.

E. Comments Regarding page 481

(1) The Bender Foundation is a private charitable foundation operating in accordance with 26 U.S.C. § 501(c)(3), which affects the nature and minimum amount of contributions made by the Foundation. The Foundation was organized in 1972 and annually makes contributions totaling between \$500,000 to \$1,000,000. It was established pursuant to the Last Will and Testament of Jack Bender and was funded by his estate. In order to sustain a high level of charitable giving, Mr. and Mrs. Bender have contributed substantial personal assets to the Foundation.

(2) Neither the Bender Foundation nor Mr. and Mrs. Bender were ever informed that the 1985 contribution to Multiple Sclerosis underwrote Mrs. Meese's salary in full or that all of the funds contributed were used to pay salary, as opposed to also covering overhead and administrative support.

(3) As stated earlier, Blake's negotiations were with the General Services Administration, not the Department of Justice, which was merely a tenant

agency. Mr. Bender had a small minority interest in the building.

F. Comments Regarding page 482

The Report suggests that the only reason that the Bender's contribution to Multiple Sclerosis did not involve an illegal gratuity is that Mr. Meese was not involved in the lease renewal. This is an unfair and misleading statement. There is no evidence that the Bender contribution to Multiple Sclerosis was intended as an illegal gratuity. The Report concedes that both Mrs. Meese's employment at Multiple Sclerosis and the idea of Bender Foundation support originated from discussions between Mrs. Meese and the Multiple Sclerosis Society. The Report does not even suggest that Mr. and Mrs. Meese were even aware of Mr. Bender's minority interest in the limited partnership which owned 425 Eye Street, N. W., or that Mr. Bender ever told anyone at Blake or the partnership involved in lease negotiations with the General Services Administration that the Bender Foundation had made the contribution to Multiple Sclerosis.

G. Comments regarding page 483

(1) Neither Howard nor Sondra Bender recall being aware of the income of Mrs. Meese at the William Moss Institute. It is not the type of information which the Benders ever recall discussing with or about Mrs. Meese.

(2) The Report does not make it clear that Mr. Bender was not one of the "businessmen" to whom Mr. Wallach wrote. This omission is regrettable as the Report also states that the Chester Arthur Building was acquired in December 1984, when these solicitations appear to have been made.

H. Comments Regarding page 484

Mr. Bender's loan to Mr. Wallach was executed in February 1988. Mr. Bender was told by Mr. Wallach that the funds were needed for legal fees, as the Government had frozen his assets thus depriving him of funds for his legal defense. The loan and security interest were duly disclosed to the United States Attorney's Office in New York, as well as the Court.

I. Comments Regarding page 486 and 487

The Report fails to note Mr. Bender and his Station Manager never discussed a salary with Mrs. Meese and that Mrs. Meese abandoned her interest in

the station before either man actually determined whether Mrs. Meese would in fact have had to be paid a salary. Station personnel did tell the Independent Counsel that had Mrs. Meese been hired, she would have had to be paid union scale, pursuant to a union agreement covering the station. The putative letter quoted on page 495 of the Report, which the Independent Counsel does acknowledge was not received by any of the alleged recipients, reflects Mr. Wallach's totally uncorroborated (and much refuted) understanding that Mrs. Meese was planning a thirteen-week series. No such series, at union scale, could yield more than a small fraction of the \$40,000 salary the Report claims Mrs. Meese needed.

(2) At page 487, the Report erroneously identifies March 1, 1985, as the date on which the Chester Arthur Building was purchased, thus erroneously juxtaposing a March purchase with a June "job" discussion. In fact, closing documents produced to the Independent Counsel demonstrate that the building was acquired in December 1984 -- as correctly stated on pages 30 and 488 of the Report.

J. Comments Regarding page 488

(1) As best as can currently be determined, the Chester Arthur Building was the only property leased by the General Services Administration from a

Bender-affiliated entity in which the Department of Justice was a tenant.

(2) The Report incorrectly identifies the Partnership which owned the Chester Arthur Building. The correct name is 425 Associates Limited Partnership. This entity is erroneously described as a "Bender Partnership." In fact, Mr. Bender's personal interest in this limited partnership amounted to approximately ten or eleven per cent.

(3) At the time the building was acquired (and continuing to this day, albeit under new ownership) the General Services Administration leased approximately 259,000 square feet of space. The Report inexplicably overstates the portion of the property which was tenanted by the Office of Information Technology. The Data Center only occupied approximately 70,000 square feet, with the balance occupied by the Immigration and Naturalization Service (approximately 180,000 square feet). The overstatement in the Report is material, as Blake negotiators recall that the only uncertainty regarding continued tenant occupancy related to the much smaller Office of Information Technology space.

(3) Blake leasing officials have no knowledge that the Department of State was a tenant at the Chester Arthur Building.

K. Comment Regarding page 489

(1) The actual legal tenant at the Chester Arthur Building throughout 1985 was the General Services Administration. Had the Office of Information Technology decided to incur the enormous expense of moving this computer facility and been able to do so prior to March 1986, the General Services Administration would have been free to locate another federal tenant in the building. As the General Services Administration has the responsibility of providing space for federal tenants, the Office of Information Technology's needs for that space was a factor in the timing of the lease renewal; but as the General Services Administration provides space to virtually all federal agencies, the role of the Department of Justice in such matters is no more than a minor one.

(2) Once again, the Report incorrectly identifies the building acquisition date as March 1985. It was acquired in December 1984.

L. Comments Regarding Pages 489-491

(1) The Report suggests that on September 30, 1985, Blake learned for the first time that the Office of Information Technology wanted to expand the Data Center and "substantial and expensive changes

might have to be made. . ." -- leaving open the question of who would bear that burden. This is misleading. From the late Spring or early Summer of 1985, Blake's negotiation records reflect that Blake was involved in numerous discussions regarding the expansion and upgrading of the Data Center -- indeed, Blake's construction forces were evaluated to perform these services and one of its prior computer center projects was toured. It was never contemplated that Blake or the partnership would bear the cost of this work. We believe the "heartburn" cited in the Report relates to the further delay in the inevitable commencement of lease discussions which would be occasioned by the Department's consideration of building new space for a centralized computer facility -- an option which Blake negotiators never took seriously in view of the extraordinary lead time required (several years).

(2) Once again, the Data Center occupied only approximately 70,000 square feet of office space.

(3) The Report fails to disclose that by October 1985, Blake had begun discussions with a back-up tenant which wished to use the Office of Information Technology space as a data center. Assuming, without any known foundation, that the General Services Administration would not have taken

this 70,000 square feet for another federal tenant, the Report merely speculates that the non-renewal by the Office of Information Technology would have been a "financial blow" to the members of the partnership. It should be noted that the lease eventually executed with the General Services Administration contemplates the early departure of the Data Center after five years, while INS will remain in place for a full ten years. Even with this early departure, the new owners purchased the property from 425 Associates Limited Partnership for approximately \$22 million, more than its acquisition cost.

(4) Blake has no idea of the origin of the 12-14 month "routine" lease negotiation period figure cited in the Report. Blake's contemporaneous records indicate that its negotiators were hopeful that negotiations with the General Services Administration could be concluded prior to March 20, 1986, when its lease expired. While it ultimately took 14 months to conclude an executed lease, such unconscionable delay by the Government was typical only of hold-over lease situations -- not cases where leases are renewed during their term.

(5) As noted earlier, Blake was notified in mid-December 1985 that the entire GSA lease would be renewed.

M. Comments Regarding pages 495-501

This portion of the Report merely reiterates and expands on early portions dealing with Mrs. Meese's employment, as to which comment has previously been made. Accordingly, this portion of the comment will only respond to new matters addressed in this section of the Report.

(1) With regard to the Ambassador's Ball, it should be noted that numerous dignitaries were involved in organizing and sponsoring the Ball and that Mrs. George Bush was the Honorary Chairperson of the Ball and the wife of the president of The American University was one of the Vice-chairpersons.

(2) It is readily apparent that the idea for Mrs. Meese's work at the Multiple Sclerosis Society and the amount of a potential Bender contribution were matters discussed and decided before the Benders and their Foundation were even approached. Neither the Benders nor their Foundation had any role in determining Mrs. Meese's compensation from Multiple Sclerosis.

(3) We believe it is unfair and improper for the Report to quote the entire contents of a putative letter by Mr. Wallach dated October 16, 1985. As the Report reflects there are serious doubts as to the authenticity of the letter, as it was not received by any of the parties to whom it was purportedly sent.

The letter speaks in terms of a tax deductible contribution by the Bender Foundation -- a consideration of no relevance to charitable foundations such as the Bender Foundation. It refers to a non-restricted contribution, when in fact, Multiple Sclerosis requested a designation to the OJM program. It implies that Mrs. Meese's compensation at the radio station had been discussed, when in fact no one connected with the station recalls any such discussion.

(4) The Report is extraordinarily vague on what Mrs. Meese's understanding was of her discussions regarding the radio station. On the one hand, it refers to her meeting with Mrs. Bradley of the Multiple Sclerosis Society on October 10 to discuss becoming the Development Director of Operation Job Match, her decision "not to pursue the radio station job," discussions with Mrs. Bradley and Mr. Wallach about her OJM salary and obtaining a private foundation grant for her position, Mrs. Bradley's suggestion of the Bender Foundation as a source of funding, Mrs. Meese's subsequent trip to Bulgaria in the last half of October 1985, and an October 29, 1985 solicitation by Multiple Sclerosis to the Bender Foundation. On the other hand, it refers to a memo Mr. Wallach inexplicably wrote to himself on October 23, 1985, (when Mrs. Meese was apparently in

Bulgaria), suggesting Mrs. Meese was still considering the radio station at this late date. It is regrettable that the Report relies on Mr. Wallach's memos to himself and letter which no one received rather than on Mrs. Meese's interview to clarify the chronology.

(5) While Mr. and Mrs. Bender told the Independent Counsel that they held Mrs. Meese in high esteem and sincerely believed that Mrs. Meese would make an excellent Development Director for OJM, the Report unfairly cites Mrs. Meese's speculation that the Benders "'probably'" just wanted to get her a job "somewhere." Assuming the reference accurately reflects the context in which the statement was made, the fact remains that the Report ignores the Benders' statements that they only considered the possibility of a radio station position when Mrs. Meese expressed an interest in public affairs programming (which the station needed) and only agreed to make a contribution when they were approached by Multiple Sclerosis and Mr. Wallach. There is no suggestion that Mrs. Meese was ever offered a job at Blake or with any other entity affiliated with the Benders.

(6) Without explanation, the Report finds it "noteworthy" that the Bender Foundation supposedly failed to respond to a general solicitation for an additional \$10,000 general purpose contribution to

Multiple Sclerosis in April 1985, but agreed to fund Operation Job Match in November after being personally approached by Mrs. Bradley and Mr. Wallach and later learning that their respected friend and Mrs. Bender's fellow American University Board of Trustees member, Ursula Meese, would be running the program. No one familiar with fundraising for charitable organizations should find that scenario either noteworthy or curious.

(7) It should be noted the 1987 Multiple Sclerosis contribution by the Bender Foundation was not earmarked for the OJM program, as Multiple Sclerosis did not so request.

(8) The Benders and their Foundation were never informed, nor did they know that Multiple Sclerosis advanced \$15,000 to Mrs. Meese in 1987. It should also be noted that this "advance" on Mrs. Meese's "1987 salary" was probably not paid with funds contributed by the Bender Foundation, as those funds were not sent to Multiple Sclerosis until April 1987.

N. Comments Regarding pages 501-504

(1) The discussion of Mr. Jenkins' consultancy is extremely misleading. The Report suggests that Mr. Jenkins may have been hired in part to assist in the Chester Arthur Building lease. The

Report ignores the testimony of Blake's chief negotiator that he never discussed those lease negotiations with Mr. Jenkins. Indeed, Howard Bender has no recollection of even discussing that project with Mr. Jenkins. The October 14, 1985 Wallach letter to Jenkins was obviously part of an effort by Mr. Wallach to help Mr. Jenkins prepare for his interview with a prospective client. The same letter refers to other matters as to which Blake neither asked for nor sought Mr. Jenkins' assistance. The Report also ignores the fact that Mr. Bender acknowledged that he was not directly involved in the lease discussions and that the only party with enough knowledge of the details of the negotiations was his chief negotiator, who testified that he never discussed this project with Mr. Jenkins. Mr. Jenkins apparently corroborates this testimony completely. The Report cites no evidence to contradict this testimony. Nonetheless, the Report goes to great length to suggest that Mr. Jenkins was somehow involved without citing a single shred of evidence. Contrary to the Report, there is absolutely no conflict in the record that we know of with respect to Mr. Jenkins' lack of involvement in the 1985 General Services Administration lease renewal. All the Independent Counsel can cite to is that Wallach

merely told Jenkins that the negotiations were on-going.

(2) The Report suggests that there was no independent business purpose for Blake hiring Mr. Jenkins and suggests that this view is shared by "key company personnel." This is simply not true. While it is true that Blake did not need a consultant to assist it in "dealing with the Federal Government," that was not why Mr. Jenkins was hired. He was hired to assist Blake in expanding its private sector business, an area in which he claimed competence. Moreover, the Independent Counsel is aware that Blake did in fact hire other "outsiders" to assist it in private sector marketing during this period.

O. Comments Regarding page 504-506

(1) The Independent Counsel fails to report that no one at Blake even knew of Mr. Everson, nor did they request or become aware of any 1986 contact between Mr. Wallach and Mr. Everson regarding the Chester Arthur Building. The elaborate discussion of Mr. Everson's possible involvement with the Chester Arthur Building lease in 1985 is inflammatory as there appears to be no evidence of such involvement. The predicate for this discussion is cited in footnote 194 (at page 504) as Mr. Everson's friendship with Mr. Wallach and Mr. Wallach's "apparent

involvement in the lease renewal problems Mr. Bender's company was facing in early October 1985. . . ." This is nothing short of outrageous. The Report cites not one bit of evidence, nor are we aware of any, that Mr. Wallach had any involvement with the Chester Arthur Building lease matter in 1985.

(2) This portion of the Report corroborates what Blake witnesses have uniformly told the Independent Counsel: that the Justice Department had no role in the negotiation of the terms and conditions of the lease for the Chester Arthur Building. .

P. Comment Regarding page 507

Mr. Wallach was present on only two of the three events at which Mr. and Mrs. Meese socialized with the Benders. He was present at only one of the luncheons.

Dated: July 14, 1988

Respectfully submitted,

DICKSTEIN, SHAPIRO & MORIN

By: Justin D. Simon
 Seymour Glazer
 Justin D. Simon
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Attorneys for Blake
 Construction Co., Inc.,
 The Bender Foundation and
 Howard and Sondra Bender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Certain Named Individuals with Respect to The Report Filed by Independent Counsel James McKay has been served by hand-delivery, this 14th day of July, 1988 to:

James C. McKay, Esquire
Office of Independent Counsel
1111 18th Street, N.W.
Suite 500
Washington, DC 20036


Justin D. Simon

In re Nofziger, Edwin Meese III -
 Div No. 87-1
 Appendix

FILED UNDER SEAL

United States Court of Appeals
 For the District of Columbia Circuit

Comments of Franklyn C. Nofziger

FILED JUL 14 1988

CONSTANCE L. DUPRÉ
 CLERK

Pursuant to this Court's order of July 6, 1988

Franklyn C. Nofziger was granted the right to review and comment upon the Independent Counsel's Report: In re Edwin Meese, III. The portions of the Report that refer to Mr. Nofziger are not, in his view, balanced and measured conclusions. Rather, they reflect one-sided opinions or impressions of the Independent Counsel. In several instances, Mr. Nofziger was never even asked about his role in events that are, nonetheless, duly catalogued as if they are "facts" by the Report. This leaves the reader with certain unfair inferences about Mr. Nofziger's activities during the period at issue, and compels him, within the very brief time available to him for review and comment, to request that the following specific comments be included as an Appendix to the Report.

1. The Report suggests that Mr. Nofziger "successfully solicited Mr. Meese's assistance" in a 1982 contract dispute between Welbilt and the Army. It leaves the impression that Mr. Nofziger spent considerable time and effort regarding this dispute. Aside from one letter written to Mr. Meese within one year of leaving the White House, however, Mr. Nofziger's involvement was negligible. It did not include any arguably corrupt or venal acts, and there was no further contact between the two individuals on the subject. He had no contacts with Jim Jenkins and was not in attendance at any meetings on the matter. Indeed, Mr. Nofziger suffered a stroke soon after the April 8, 1982 correspondence and thereafter had no personal role in this dispute whatsoever.

2. According to the Report, while Mr. Nofziger was employed at the White House, an individual who volunteered in Mr. Nofziger's office on a part-time basis, Pier Talenti, visited the Welbilt plant. This leaves the inference that Mr. Nofziger knew of, and approved, this activity. To the contrary, Mr. Nofziger was not aware of it. The visit was not financed or otherwise approved by any White House official, and White House documents contain no record of the visit. Mr. Talenti has repeatedly stated that Mr. Nofziger was not aware of his personal interest in Welbilt, and that he did not make the statements attributed to him by Mr. Wallach, as reflected on pages 164-5 of the Report. The Independent Counsel repeatedly interviewed Mr. Talenti and was aware that Mr. Talenti insisted Mr. Nofziger was unaware of his activities. Independent Counsel, in fact requested dismissal of the counts in the indictment directly related to Mr. Talenti and specifically refused to call Mr. Talenti at trial for the one count indirectly involving him.

3. By repeatedly referring to Mr. Wallach and Mr. Nofziger in tandem, the Report leaves the erroneous impression that these two men knew one another and worked in active concert on Wedtech's behalf during the 1982 contract dispute. Nothing could be further from the truth. Not only did Mr. Nofziger play virtually no personal role, at that time Mr. Nofziger had not heard Mr. Wallach's name, had never met

him and was not aware that Mr. Wallach had any relationship to Welbilt. The two men did not meet until at least a year after the engine contract was awarded, as is well-known by the Independent Counsel.

4. (a) The Report states that, in 1983, Welbilt provided stock interests in the company to "insiders and friends of the company," and erroneously includes Mr. Nofziger in these categories. While he did receive stock as compensation for services, Mr. Nofziger was not a "friend" of the company or its officers, nor was he a corporate "insider." He met Welbilt officials only on rare occasions, most often in the context of a social function. He has no background or experience in corporate management and finance, and was never consulted about the operation or funding of Wedtech. At no time did he possess internal financial or other data, and he never obtained inside information about the company.

(b) Evidence at Mr. Nofziger's trial concerning the award of stock to him clearly established that Mr. Nofziger had not been paid in-full for services rendered to either Welbilt or to the Latin American Manufacturers' Association. In lieu of additional cash payments, which Welbilt was unable to provide, he agreed to accept less than one percent of all the shares in the company. These shares were at the time of questionable value and could not, in any event, be sold for two years.

5. The Report describes 1983 discussions concerning EDA's agreement to subordinate its interests to the Bank Leumi. Again, the inference is that this activity was somehow sinister. This transaction was perfectly appropriate and reflects a common financing strategy. None of Mr. Nofziger's contacts were improper, and neither he nor anyone else has ever been charged with any wrongdoing in connection with the EDA matter. Independent Counsel also never questioned Mr. Nofziger about these matters when they interviewed him.

6. The Report refers to a July 1985 meeting where Mr. Nofziger and others met "to organize efforts to obtain the 1986 pontoon contract options..." During Mr. Nofziger's interview with the Independent Counsel he was never asked about his presence at this meeting, or what was discussed. In fact, Mr. Nofziger only attended the meeting for approximately the first 30 minutes, when he left and did not return. While he was present, the only topic discussed was Wedtech's desire to sell machine parts to foreign carriers. He never had any subsequent conversations on this topic and he took no action to implement anything mentioned at that time. He played no role in relation to the pontoon contract and had no knowledge of any fee arrangements outside the monthly retainer.

7. The Report suggests that a French lawyer recommended Mr. Nofziger to Mr. Bruce Rappaport to assist him with the Aqaba pipeline project. Mr. Nofziger has met this lawyer only

once, does not know him and does not know why or how he was recommended by him. In fact, Mr. Rappaport never contacted Mr. Nofziger about this project and Mr. Nofziger does not now know, and never has known, Mr. Rappaport.

8. Finally, the Report makes reference to Nofziger-Bragg purchasing \$5,000 tables at two different charitable fundraisers for Multiple Sclerosis, and suggests that Mr. Wallach "arranged" for this purchase in conjunction with several other groups. In reality Mr. Nofziger's tables were purchased through an individual named Ronald Crawford and Mr. Wallach played no role whatsoever. Mr. Nofziger was unaware that Mr. Wallach arranged for any purchases by anyone and he rejects all suggestions that his contributions to these worthwhile affairs were linked in any manner to Mr. Wallach or to Wedtech. Once again, during his interview with the Independent Counsel, Mr. Nofziger was never questioned about this subject.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert Plotkin", written over a horizontal line.

Robert Plotkin
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Counsel for Franklyn C. Nofziger

In re Hofzinger, Edwin Meese III
Div No. 87-1
Appendix

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For the District of Columbia Circuit

CABLE "JURISPOLL"

FILED JUL 14 1988

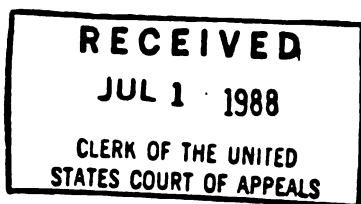
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CONSTANCE L. DUPRE
CLERK

July 13, 1988

FEDERAL EXPRESS

United States Court of Appeals
For The District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Attn: Division for the Purpose of
Appointing Independent Counsels

Honorable Sirs:

We are counsel to new management of the Wedtech Corporation. Pursuant to your Order filed on July 6, 1988, Wedtech has received for "comment or factual information" a copy of portions of the July 5, 1988 Report of the Independent Counsel in re: Edwin Meese III in which Wedtech is mentioned. This letter constitutes new management of Wedtech's comments for possible inclusion as an appendix to the Report.

On pages 282-283 of the Report, mention is made of Wedtech's filing for bankruptcy protection and the retention of this law firm. The report further refers to our advice to Neuberger, Guariglia, Moreno and Shorten, the former Wedtech officers, to obtain separate counsel and to the fact that on January 30, 1987 each of them pled guilty to crimes committed in the course of their management of Wedtech. We would like to take this opportunity to clarify that portion of the Report.

POLLNER, MEZAN, STOLZBERG, BERGER & GLASS, P. C.

To: U.S. Court of Appeals

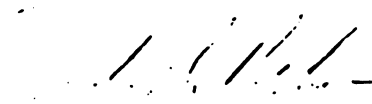
July 13, 1988

Page Two

After we were retained in December, 1986, we met with the representatives of the U.S. Attorneys' Office, Southern District of New York. As a result of those meetings and our own internal investigation, we advised the four former officers to resign, which they did on January 13, 1987. A new Board of Directors was then constituted. The Report is accurate in that on January 30, 1987 Neuberger, Guariglia, Moreno and Shorten each pled guilty, but at that point they were no longer officers or directors of the company.

Finally, we and new management of Wedtech commend the Independent Counsel and his staff for the thoroughness of their efforts and the diligence with which the investigation was pursued. We feel that this Report sheds important light on the sordid history leading to the destruction of Wedtech and, thus, profoundly serves the public interest.

Sincerely,



Martin R. Pollner

MRP:smr

cc: James C. McKay,
Independent Counsel, (Federal Express)

Carol Bruce,
Deputy Independent Counsel, (Federal Express)

In re McGowan, Edwin Meeze III
 Div. No. 87-1
 App. No. 87-1

IN THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division For the Purpose Of Appointing Independent Counsels
 Ethics in Government Act of 1978, As Amended

IN RE: GRAND JURY INVESTIGATION	)	DIV. NO. 87-1
OF EDWIN MEESE III	)	(TO BE FILED
	)	UNDER SEAL)

THE RESPONSE BY E. ROBERT WALLACH
AS ONE OF THE INDIVIDUALS NAMED IN INDEPENDENT
COUNSEL MCKAY'S REPORT

I.

INTRODUCTION

The report of the Independent Counsel is a complete vindication of Mr. Wallach. Although it does not appear in the report until a footnote on page 262, it is now unequivocally established that 1) "THEY (THE WEDTECH OFFICERS) APPARENTLY CONCEALED THOSE ILLEGAL SCHEMES FROM MR. WALLACH and from any individuals available to join Wedtech's management." This is reaffirmed at page 227 with the statement that "ACCORDING TO THE THREE FORMER WEDTECH OFFICERS, MR. WALLACH WAS NOT AWARE OF THE ENTIRE RANGE OF THEIR CRIMINAL CONDUCT WHEN HE ATTENDED THE MEETING." (emphasis added)

1 The report is misleading in not acknowledging the full
2 extent of Mr. Wallach's cooperation. Three days after he
3 returned from six weeks as U.S. Representative to the
4 Commission of Human Rights of the United Nations, Mr.
5 Wallach voluntarily appeared for an interview with Mr. McKay
6 and members of his staff which lasted approximately two and
7 a half hours. He then voluntarily appeared before the Grand
8 Jury for approximately five and a half hours, answering
9 every question directed to him. On September 27 he
10 voluntarily appeared before the staff of the Independent
11 Counsel and Mr. McKay for six and a half hours. When it
12 became apparent that he was a subject of the investigation
13 in the Southern District, Mr. Wallach offered to testify,
14 WITHOUT ANY CONDITIONS, before the Independent Counsel ON
15 ALL SUBJECTS if the investigation of his activities would be
16 consolidated into the Independent Counsel's jurisdiction.
17 The Independent Counsel declined the offer. It was not
18 until that occurred that MR. WALLACH, upon advice of
19 counsel, invoked his constitutional privilege. Mr. Wallach
20 supplied to the Independent Counsel all of his financial
21 records from 1980 through 1987, including his bank records,
22 credit card receipts, telephone bills, investments, tax
23 returns, calendars, telephone message pads, and all
24 documents pertaining to Wedtech and Edwin Meese, III. He
25 also voluntarily provided his entire file and complete
26 computerized working discs relating to the Iraqi-Aqaba

1 pipeline project. These facts appear nowhere in the
2 report. Finally, it is important to note that the report
3 unquestioningly quotes the Wedtech officers without
4 presenting the contrary testimony of Mr. Wallach and other
5 obtained by the Independent Counsel through Grand Jury
6 testimony and interview. The report does not acknowledge
7 the status of these individuals as admitted felons and
8 perjurers until page 276 in FOOTNOTE 135. While the report
9 refers to Mr. Wallach's memos, it does not acknowledge that
10 over 250 memos describing extensive work effort by Mr.
11 Wallach were obtained from Wedtech and Mr. Wallach and were
12 within the knowledge and control of the Independent Counsel
13 in early 1986.

14 II.

15 THE REPORT ESTABLISHES THE PROPRIETY AND LEGALITY OF 16 MR. WALLACH'S EFFORTS ON BEHALF OF WEDTECH

17 1. There is no evidence of direct or indirect payment
18 to Edwin Meese, III (Pages 524 and 537).

19 2. Mr. Wallach was not retained by the company until
20 January, 1983 and not paid by them until September, 1983.

21 3. Mr. Wallach was "genuinely interested" in Welbilt
22 as a minority enterprise when he undertook his activities
23 for them in 1981/1982 (Page 140).

24 4. Mr. Wallach was interested in the company
25 obtaining AN AUDIT to determine the fairness of the contract
26 price (Pages 142 and 153). When the audit was performed it

1 resulted in a "narrowing of the price" (Page 163) thus
2 attesting to the accuracy of the Welbilt request (EMPHASIS
3 ADDED).

4 Note that the report to the Independent Counsel
5 neglects to draw upon the report of the Levin Sub-Committee
6 which found that in 1981 and 1982 "A VALID SOCIAL POLICY"
7 EXISTED FOR AWARDED THE CONTRACT TO WELBILT AS A GENUINE
8 MINORITY ENTERPRISE BENEFITTING THE SOUTH BRONX. (EMPHASIS
9 ADDED).

10 5. Mr. Wallach had no financial interest in the
11 company in 1981 and 1982 (Page 16) and, according to the
12 Levin report, not mentioned by this report, NO EXPECTATION
13 OF COMPENSATION FOR HIS EFFORTS.

14 6. Mr. Wallach was not involved in the arrangements
15 or accomplishment of meetings held in the White House or at
16 the Small Business Administration (Page 160 et. seq.).

17 The report fails to note the finding of the Levin Sub-
18 Committee that the Wedtech file, presumably containing the
19 1981 memos of Mr. Wallach was "lost" in the White House when
20 efforts were made to find it in December 1981. Mr. Jenkins
21 has testified that he did not see Mr. Wallach's memos of
22 1981 before commencing his activities on behalf of Welbilt
23 or while he was so engaged, a fact also not noted by the
24 report.

25 7. Mr. Wallach did not receive stock worth
26 \$720,000.00 in 1983. Although the report alleges that fact

1 at page 17, it is refuted in the report itself at page 217
2 when the two year restriction on the sale of the stock is
3 first mentioned and there is acknowledgement that the "value
4 is difficult to determine...". The report fails to note
5 that the valuation placed upon the stock by the Underwriter
6 was \$27,000.00 upon date of issuance.

7 8. It is clear that Mr. Wallach did not receive stock
8 in the company as part of his original consulting agreement.
9 The report is in error at page 16 when it so describes the
10 agreement, as reflected in the report accurately at page
11 179. The report neglects the testimony of Mr. Wallach that
12 he rejected the offer of the stock in early 1983, and only
13 accepted it in the late spring when informed that all
14 others, including the Squadron Law Firm, were to receive one
15 percent (1%). Thus, refuting the spurious implication of
16 footnote 85. There was clearly no relationship between Mr.
17 Wallach's effort to secure the audit and the subsequent
18 stock offering. This has been confirmed by the testimony of
19 the Wedtech officers and is reflected in the memos of Mr.
20 Wallach in the possession of the Independent Counsel.

21 9. There is no impropriety in the introduction of Mr.
22 Chinn to Mr. and Mrs. Meese. No improper financial benefit
23 accrued to Mr. and Mrs. Meese by virtue of Mr. Chinn's
24 efforts and no Wedtech stock was purchased.

25 10. Mr. Wallach did not engage in any impropriety
26 regarding the transfer of stock within Wedtech in order for

1 the company to remain in the 8(a) program. He insisted upon
2 adherence to legal standards (Pages 219-223).

3 11. Ignores the activities of Mr. Wallach on behalf of
4 Wedtech, including but not limited to as it relates to the
5 efforts of Mr. Wallach, we know that he was involved with a
6 meeting with the Western Electric in New York city, the
7 Japanese in New York City, with Pinkasohv, with the attorney
8 Tim Sullivan, who was the contract attorney as it related to
9 the GAO investigation. He was involved with Bechtel Silver
10 and Minerals, Inc., with a Richard Gogglin, President, as it
11 related to the coating process. He was totally familiar
12 with the coating process which was the area of main concern.
13 He was involved the area of main concentration of the
14 company in the metal tubes, the weight guide, the printed
15 circuit board, the fiber optics, the jet engine turbine
16 blades, the valve, petroleum industries. He was involved
17 with Union Carbide, GTE, GE, Cameron Oil and various other
18 companies. He was involved with a Marshal Cogan as it
19 relates to the financial statement prepared on behalf of
20 Welbilt. He was involved with the patent problems as it
21 related to the coating process. He was involved with most
22 of the current contract disputes with the Department of
23 Defense. He was involved with the negotiations with Alcoa.
24 He was involved with the Xerox negotiations in Dallas,
25 Rockwell International, Cameron Company. He participated in
26 the negotiations as it related for the arrangement of the

1 bridge loan in May of 1983. In his continued efforts as it
2 relates to the obtaining of working of capital on behalf of
3 Wedtech. He was constantly involved in the continuing
4 financial problems of Welbilt and the inability to raise
5 adequate capital. He was involved in the E.D.A.
6 complications. He was involved attempting to contact the
7 President's Science Advisor as it related to the coating
8 process. He was involved in litigation in reference to
9 Carmo. He was intimately involved in the discussion of the
10 current status of three-horsepower engine, the teledyne bid
11 and the next steps to be taken in relationship with Tim
12 Sullivan. He was involved in the tax analysis and status as
13 it relates to the distribution of shares to various members
14 of Wedtech. He made specific suggestions as it related to
15 the internal procedures which included the division of
16 authorities as it related to the coating process, Israel,
17 the internal manufacturing operations and the financial and
18 accounting controls. He was involved in the 8(a) problem
19 which had to do with the minority company procedures and
20 specifically as it related the explanation or the
21 interpretation of the economic disadvantage. He was
22 involved with the question of the availability of the
23 remaining two engine contracts as of September 1983 which
24 was the three-horsepower and the one-and-one-half horsepower
25 contracts that were available as well as the twenty-
26 horsepower. He was involved in contract negotiations with

1 Hewlitt-Packard, Bunker-Ramo, Xerox, Mitsubishi, Union
2 Carbide, Alcoa, Spragge Electric, Gould (Penn Central),
3 Texas Instruments, General Electronics (all three
4 divisions), AMF, TRW, Davis Aircraft, Seleco, IBM, Babcock
5 and Wilcox, and Western Electric. He was involved FCC for
6 compliance as it related to a computer cabinet coatings. He
7 was involved in a request for an extension of Wedtech
8 Corporation's Fixed Program Participation term as it related
9 to Small Business Administration. He was negotiating as it
10 related to the French tank tread contract company being
11 CANAT.

12 Mr. Wallach's memorandum of October 17th fully explains
13 that he did not want to go public and had some initial
14 concern about going public.

15 He was involved in the Navy causeway pontoon
16 fabrication program as it related to the navy requirement,
17 its background, the proposed 8(a) approach and its
18 rationale.

19 Mr. Wallach was constantly supplied with memoranda from
20 Wedtech as it related to each and every contract that they
21 entered into which he then would review and comment on as it
22 related to his policy decision.

23 Mr. Wallach analyzed copies of the abstracts of bid
24 solicitation for the gasoline engine twenty-horsepower.
25 Also he was involved in discussion of trade potential in
26 France, French-speaking North Africa, the French entering

1 the Middle East and the French contracts in Columbia,
2 Venezuela, Peru, Bolivia and Brazil.

3 He was totally involved in upgrading the manpower
4 within the facility as well as the upgrading of the
5 personnel in Wedtech as the company grew larger.

6 He was involved in the acquisition of the Internal
7 Management contract, the fire pumps contract for the United
8 States Navy, approximately Fifty-Five Hundred over the next
9 five year period, the sterling engine with a company in New
10 York called MTI (Mechanical Technology, Inc.), the situation
11 of Wankel engine as it competes with the Sterling engine in
12 the Department of Defense contracts. He was involved with
13 the arrangement with Wenkel in Germany in the investment of
14 1.5 Million in R&D products for joint venture. He was
15 heavily involved in the acquiring of ONTONAGON ship building
16 facility as it related to ship building in Ontonagon and the
17 pontoon contracts as well as other areas of business.

18 He was involved in negotiations with Ken Ross on a
19 Section 8(a) business plan, involving practice bombs,
20 practice training rockets, impulse cartridges, flares, etc..

21 He was involved in consultation as it relates to the
22 delay of Wedtech and various governmental contracts, the
23 reason for said delays being unsatisfactory performance by
24 others than the Wedtech company, involving the concept that
25 delay in the receipt of government furnished property has a
26 serious negative impact upon Wedtech corporation's

1 production schedule.

2 He was involved in the review and evaluation made by
3 the tank automotive command concerning the over all
4 performance of the Wedtech corporation as well as the Navy
5 facility's engineering command contracts regarding pump
6 assemblies and ward machinery pumps.

7 He was kept current and up-to-date and advised Wedtech
8 concerning important developments which would substantially
9 benefit U.S. companies engaged in export trade in the
10 Pacific Basin area.

11 The above-mentioned are merely reference areas of
12 volumes of material that Mr. Wallach either produced,
13 perused, evaluated and/or made judgement upon.

14 He was involved in attempting to make Wedtech the prime
15 U.S. contractor for a major portion of a newly announced
16 increasing purchases from State of Israel for U.S. military
17 programs as October 18, 1984.

18 He was involved the contract for tank rehabilitation
19 with the West German government, estimated value 25 million.

20 He was involved with the Upper Peninsula Ship Building
21 Company as well as the barge extension of that particular
22 contract in which the were meetings with the Coast Guard.

23 He was also combining his efforts with the continuing
24 involvement in the Silicon Valley area as well as on-site
25 contract with Amelio Font.

26 He was involved in the 1985 six-option on the pontoon

1 contracts and the maintenance vehicle contract and the
2 overseas contracts with West Germany, Italy, Pakistan,
3 Egypt, South Korea, Taiwan, Israel, Canada.

4 He was involved in the attempt in representing the
5 Wedtech corporation in respect to sales to Israel of "kits"
6 to upgrade the M-113 armored personnel carrier.

7 He was involved with contacts in Yugoslavia regarding a
8 contract regarding the tug barge which involved the upper
9 Michigan shipyard.

10 He was involved regarding a contract relative to the
11 helicopter; in Wedtech's contract performances attacked
12 around October 1985 relative to the pontoon contract, six-
13 horsepower engine contract, the grille assembly contract,
14 the smoke grenade launcher kit and the smoke grenade
15 launcher contracts, the suspension kit contract, and the
16 remaining contracts which represented as very small
17 percentage of Wedtech's government contract work; the 1986
18 contract for field maintenance vehicles, with SUMITOMA
19 corporation regarding the coating process, with the army as
20 it related to the coating process of helmets for military
21 and/or law enforcement personnel, and Mr. Wallach continued
22 to work as legal and policy advisor to Wedtech from 1981
23 through 1986.

III.

THE REPORT CONTAINS FACTUAL ERRORS

In addition to those factual efforts identified in Part II above:

1. The report refers to Mr. Wallach's efforts to "procure a contract," when it clearly states at pages 142 and 153 that he sought an "audit" for the company to determine if they qualified for the contract.

2. The report misleadingly states that Mr. Wallach was reimbursed his expenses by Welbilt in 1981 and 1982. (Page 16). It fails to point out that the only expense reimbursement was for one (1) airline ticket from San Francisco to New York to San Francisco in April 1981 (first-class) which was not arranged for prior to Mr. Wallach's initial visit to the Welbilt Plant but was subsequently

offered by the Welbilt officers. This was testified to by Mr. Wallach in March 1986 before the Grand Jury and corroborated by the Independent Counsel.

3. The report refers to the award of stock options to Mr. Wallach, without acknowledging that the same or larger options were awarded to others within the company and its consultants, and that Mr. Wallach never exercised the options.

4. The report omits to identify the law firm of Squadron, Ellenoff, etc., as a recipient of 1% of the stock

1 when the company initially went public (Page 185).

2 5. The report inexplicably omits reference to Grand
3 Jury and interview testimony provided by those directly
4 involved which clearly established that Mr. Wallach was not
5 involved in the administrative events which are described in
6 footnote 8, page 42 and could not have intentionally caused
7 those events to occur.

8 THE PIPELINE

9 THERE IS NO EVIDENCE OR FINDING OR ANY IMPROPER
10 OR ILLEGAL ACT ON MR. WALLACH'S PART

11 The narrative report clearly demonstrates that:

12 1. Mr. Wallach's activities were lawful and in
13 furtherance of a project which had the approval of the U.S.
14 Government in the national interest of the United States and
15 the best interests of the countries involved. At all times,
16 Mr. Wallach worked with, and within the guidance of,
17 representatives of the United States Government.

18 2. The report is in internal conflict as to when Mr.
19 Wallach was "retained" by Mr. Rappaport (Page 391),
20 acknowledging that despite Mr. Rappaport assertion, Mr.
21 Wallach did not receive any funds from him until AUGUST,
22 1985, one month after Judge William Clark had agreed to
23 represent Mr. Rappaport in Baghdad at \$500.00 per hour plus
24 expenses. Mr. Wallach contacted Mr. Meese in JUNE, 1985,
25 for guidance and was referred to Mr. McFarlane at that time
26 (emphasis added).

1 3. A major portion of the narrative concerning the
2 pipeline project in the report is drawn, sometimes verbatim,
3 from the memos and telexes of Mr. Wallach, voluntarily
4 provided to the Independent Counsel. There is, however, no
5 acknowledgement of the number of documents or reference to
6 the extensive work effort involved by Mr. Wallach. The
7 report does acknowledge that Mr. Wallach was identified as
8 the "point man" on the project to Mr. Wigg, by then National
9 Security Counsel advisor, Mr. McFarlane.

10 THE BENDER-MEESE ISSUE

11 There is no evidence of any illegal or improper conduct
12 by Mr. Wallach. The comment that Mr. Wallach and Mr. Bender
13 "may have had an ulterior motive" is gratuitous and without
14 any factual foundation, as the report reveals.

15 The report is in error in stating, at page 32 that Mr.
16 Wallach suggested the figure of \$40,000.00 (ultimately
17 donated by the Benders). At page 496 the letter is quoted
18 with reference to \$25,000.00-\$30,000.00.

19 The report has number of gratuitous and unprofessional
20 attacks upon Mr. Wallach and his motives. (page 32 above;
21 page 36) "for his own benefit" -- when the Independent
22 Counsel acknowledges Mr. Wallach had no financial interest
23 in Welbilt at the time; page 158 "may have provided
24 information; footnote 71 "may imply his belief; pages 259-
25 260 "tout his usefulness"; footnote 85 discussed in Part II,
26 8; footnote 87 denigrating without foundation his language

1 in a memo solely to Wedtech officers "financial rewards, if
2 any, are a far more speculative motivation for Mr. Wallach
3 than the accomplishment of ... meaningful social
4 contribution."

5 **CONCLUSION**

6 This conduct combined with the omission of any
7 reference to the number of memoranda addressed by Mr.
8 Wallach to the Wedtech officers over a 5 year period, the
9 failure to cite his testimony before the Grand Jury, his
10 interview by the Independent Counsel, or with the staff and
11 Senator of the Levin Sub-Committee, and the unquestioning
12 acceptance of the testimony of the Wedtech officers as
13 though they were not already perjured witnesses is
14 inexplicable within the mandate to conduct an objective,
15 fairly balanced and accurate report.

16 Dated: July 13, 1988 Respectfully submitted,

17
18
19 
20 GEORGE G. WALKER, ESQ.
21 633 Battery Street, Suite 635
22 San Francisco, California 94111
23 (415) 421-6911

24 ATTORNEY FOR E. ROBERT WALLACH
25
26

LAB OFFICES
ALBERT J. KRIEGER, P.A.
896 SOUTH BAYSHORE DRIVE
MIAMI, FLORIDA 33133

4. BELIEF IN GOD

5. 5-10. 1-1. 2-5510
1. 5-10. 1-1. 2-5510

• 2011年12月1日，中国首艘航空母舰“辽宁”号在大连造船厂正式下水。

• 2012年12月1日，中国首艘自行设计、自主建造的30万吨级超级油轮“中远海运”号在大连造船厂正式下水。

• 2013年12月1日，中国首艘自行设计、自主建造的30万吨级超级油轮“中远海运”号在大连造船厂正式下水。

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July 13, 1988

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MICHIGAN OFFICE
227 E. - 8 - 100
DETROIT 1, MICHIGAN 48224

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In re Hofzinger, Edwin Meese III
Div No. 82-11
Appendix

Federal Express

United States Court of Appeals
For the District of Columbia Circuit

The Honorable George E. MacKinnon
Senior Circuit Judge
United States Court of Appeals
For the District of Columbia Circuit
5329 U. S. Courthouse
333 Constitution Avenue, N. W.
Washington, D. C. 20001

FILED JUL 14 1968

CONSTANCE L. DUPRE
CLERK

In re: Franklyn C. Nofziger, Edwin Meese III
Division No. 87-1

Re: Report of Independent Counsel

Before: MacKinnon, Presiding, Morgan and Pell, Senior Circuit Judges

Dear Judge MacKinnon:

As counsel for Dr. R. Kent London, an individual who is referenced in the Report of Independent Counsel, accepted by the Court's Order, filed July 6, 1988. I submit this letter in response to such portions of the Report which were provided to my client.

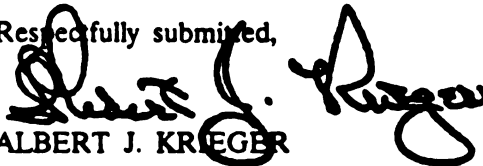
Upon review of these redacted portions, it is my submission that the Report contains a number of misstatements, mischaracterizations, and false conclusions in regard to Dr. London -- all of which will be refuted by both witnesses and documents at the trial of the charges against Dr. London in the Wedtech matter, which is pending before the Honorable Richard Owen in the United States District Court for the Southern District of New York. Dr. London engaged in no illegal or improper conduct in any of his activities concerning Wedtech or any other matter, and the full presentation of these activities at the trial will result in the vindication of Dr. London.

The Honorable George E. MacKinnon
July 13, 1988
Page 2

I hope that the Court understands the dilemma that Dr. London has been compelled to face in being made a charged defendant in an indictment and in being unable, as a result thereof, to respond to similar allegations as noted in the Independent Counsel's Report. In order of priorities, it is only rational to assume that Dr. London would direct his defensive responses to that which involves himself as a named defendant.

I respectfully request that this letter be considered for inclusion as an appendix to such Report, in that it represents comments submitted on behalf of Dr. London.

Respectfully submitted,



ALBERT J. KRIEGER

AJK:cg

cc: James C. McKay, Esquire
Office of Independent Counsel
1111 Eighteenth Street, N. W.
Suite 500
Washington, D. C. 20036